SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 286

UNITED STATES, APPELLANT,

vs.

DIEBOLD, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil No. 4485

UNITED STATES OF AMERICA, Plaintiff,

v.

DIEBOLD, INCORPORATED AND HERRING-HALL-MARVIN SAFE COMPANY, Defendants

COMPLAINT—Filed August 24, 1959

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above named defendants, and complains and alleges as follows:

Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of said Act.

2. The defendant Herring-Hall-Marvin Safe Company maintains its principal offices, transacts business and may be found within the Southern District of Ohio.

Defendants

3. Diebold, Incorporated, hereinafter referred to as "Diebold," is named a defendant herein. Diebold is a corporation organized and existing under the laws of the State of Ohio with its principal office at Canton, Ohio.

[fol. 2] 4. Herring-Hall-Marvin Safe Company, hereinafter referred to as "Herring-Hall-Marvin," is a corpora-

tion organized and existing under the laws of the State of Ohio with its principal office at Hamilton, Ohio.

Trade and Commerce

5. Defendant Diebold manufactures and sells bank vaults, bank vault doors and related equipment such as drive-in and walk-up banking windows, 24-hour tellers, safety deposit boxes, bank vault accessories, night and lobby depositories, vault door combination and time locks, and fire resistive equipment such as vault doors, safes, lockers, boxes, filing cabinets and money chests. Diebold also manufactures and sells burglar alarms, radiation shielding doors, rotary files, steel shelving and other sheet metal products. The company also provides maintenance and repair service to its vault customers.

6. Defendant Diebold is one of only three companies engaged in the manufacture and sale of bank vaults and bank vault doors in the United States. It is also a leading producer of fire resistive equipment. Its net sales in 1958 were over $30,000,000 and its assets at the end of 1958 were about $13,500,000. Diebold's principal manufacturing plant for the production of bank vaults and related equipment is located in Canton, Ohio. The company distributes its products through its own outlets located in 22 States and the District of Columbia and through over 1,000 dealers located in principal cities in the United States and Canada.

7. Defendant Herring-Hall-Marvin manufactures and sells bank vaults, bank vault doors and related equipment such as drive-in and walk-up banking windows, steel under-counter works, safety deposit boxes, bank vault accessories, night and lobby depositories, and fire resistive equipment such as vault doors, safes, filing cabinets, money chests, rotary files and radiation shielding doors. Herring-Hall-Marvin sells but does not manufacture burglar alarms or combination and time locks for bank vaults. The company also provides maintenance and repair service to its vault customers.

[fol. 3] 8. Defendant Herring-Hall-Marvin's main plant is located in Hamilton, Ohio, and its products are shipped throughout the United States. Herring-Hall-Marvin is the third largest of the three companies engaged in the manufacture and sale of bank vaults and bank vault doors in the

United States. Its sales of bank vaults and related equipment in 1958 amounted to approximately $5,500,000 to $6,000,000 and its sales of fire resistive safes amounted to approximately $3,500,000. The company's net assets are valued at about $4,244,000 and its total sales in 1958 were about $10,000,000.

9. Defendants Diebold and Herring-Hall-Marvin compete with each other in the manufacture and sale in interstate commerce of bank vaults, vault doors, vault door locks, vault lockers, grills and mirrors, drive-in and walk-up banking windows, safety deposit boxes, night and lobby depositories, fire resistive safes, fire resistive vault doors, fire resistive boxes and filing cabinets, money chests, rotary files and radiation shielding doors, and in the sale of burglar alarms and fire resistive extra width double doors.

Offense Charged

10. By an Agreement of Purchase and Sale between Diebold and Herring-Hall-Marvin dated July 17, 1959, the defendants agreed that all the properties and assets of Herring-Hall-Marvin should be transferred to Diebold in exchange for about $3,000,000. The defendants threaten to and will proceed to carry out said Agreement unless the relief herein prayed for is granted.

11. The effect of the carrying out of the aforesaid Agreement, with respect to the above described interstate trade and commerce, may be substantially to lessen competition or to tend to create a monopoly, in violation of Section 7 of the Clayton Act, in the following ways, among others:

[fol. 4] (a) Competition between Diebold and Herring-Hall-Marvin will be eliminated,

(b) Competition generally may be substantially lessened,

(c) Concentration will be materially increased, and

(d) The acquisition of Herring-Hall-Marvin's properties and assets will enhance Diebold's competitive advantage over smaller producers to the detriment of competition,

in the production and sale of bank vaults, vault doors, vault door locks, vault lockers, grills and mirrors, drive-in and walk-up banking windows, safety deposit boxes, night and

lobby depositories, fire resistive safes, fire resistive vault doors, fire resistive boxes and filing cabinets, money chests, rotary files, radiation shielding doors, burglar alarms, fire resistive extra width double doors and steel undercounter works.

Prayer

Wherefore Plaintiff Prays:

1. That pursuant to Section 15 of the Clayton Act an order be made and entered herein requiring defendant Diebold to be brought before the court in this proceeding and directing the Marshal of the Northern District of Ohio, Eastern Division, to serve summons upon it.

2. That the proposed acquisition by Diebold of the properties and assets of Herring-Hall-Marvin be adjudged a violation of Section 7 of the Clayton Act.

3. That the defendants Diebold and Herring-Hall-Marvin and all persons acting on their behalf be enjoined from carrying out the Agreement or any similar plan or agreement.

4. That a preliminary injunction issue against the defendants Diebold and Herring-Hall-Marvin preventing and restraining them from taking any action in furtherance of the Agreement or any similar plan or agreement pending final adjudication of the merits of this complaint.

[fol. 5] 5. That plaintiff have such other relief as the Court may deem just and proper.

6. That the plaintiff recover the costs of this suit.

John M. Toohey, Attorney, Department of Justice.

William P. Rogers, Attorney General. Robert A. Bicks, Acting Assistant Attorney General. George D. Reycraft, Attorney, Department of Justice. Hugh K. Martin, United States Attorney, by Richard H. Pennington, Asst.

[fol. 6] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed August 24, 1959

United States of America, plaintiff, pursuant to Section 15 of the Clayton Act (38 Stat. 736) hereby moves the court for the entry of an order, upon notice to the parties and appropriate hearing, pending final determination on the merits of the complaint in this case, temporarily enjoining and restraining the defendants from taking any action in furtherance of the agreement referred to in the complaint or any similar plan or agreement, on the grounds that:

(1) The verified complaint attached to this motion establishes a *prima facie* violation of Section 7 of the Clayton Act;

(2) Section 15 of the Clayton Act authorizes the court in its discretion to make such temporary restraining order or prohibition as shall be deemed just in the premises;

(3) The issuance of the proposed preliminary injunction is necessary to prevent the consummation of the corporate acquisition alleged to be illegal pending final determination of the merits of the complaint.

John M. Toohey, Attorney, Department of Justice.

[fol. 7] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF RAYMOND KOONTZ IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION—Filed September 1, 1959

STATE OF OHIO,
County of Hamilton, ss:

RAYMOND KOONTZ, being duly sworn, deposes and says:

I

1. I am the President of Diebold, Incorporated, an Ohio corporation (herein called "Diebold"). I have occupied that position at all times since April 7, 1952; prior to that date, from 1947 to 1951 I was a Vice President and Treasurer of Diebold and from 1951 to April 7, 1952 I was the Executive Vice President and Treasurer of Diebold.

2. Warren Mosman (herein called "Mosman") is the President of Herring-Hall-Marvin Safe Company, an Ohio corporation (herein called "H-H-M"). Mosman is the owner of approrimately 88% of the outstanding stock of H-H-M. Mosman and his wife constitute two of the three directors of H-H-M.

[fol. 8] 3. On various occasions commencing in or about May 1957, Mosman had spoken to me about his desire to sell the business of H-H-M. He particularly emphasized that his investment in H-H-M represented substantially all of his personal resources and that he was confronted with the urgent necessity of arranging his affairs so that upon his demise his legal representatives would have the funds necessary to pay the estate tax that would be levied upon his estate. He also emphasized, as a reason for selling, that if he should become ill or incapacitated, he did not have top management personnel competent to carry on the business of H-H-M successfully.

4. On May 23, 1957, as a result of negotiations, Mosman and I reached an oral agreement that Diebold would purchase the business of H-H-M on the following basis: $1,000,-

000 for its net current assets; $750,000 for its machinery and equipment; and a 20-year lease of the buildings at $100,000 per year. After having reached this agreement, on September 21, 1957—four months later—Mosman told me that, notwithstanding our verbal agreement, he wanted me to reconsider the deal and he insisted upon a higher price for the business of H-H-M. Thereupon I broke off discussions. After that Mosman and I had no further conversations about Diebold's acquisition of the business of H-H-M until late in February 1959 when Mosman again approached me and said he was seriously interested in selling. I told him I was not interested, having in mind my experience with him in 1957 when, after we had reached an agreement, he refused to go through with the transaction unless the terms could be improved.

5. In the latter part of May 1959, Mosman telephoned me and renewed his proposal to sell the business of H-H-M, assuring me that he would offer the properties to Diebold [fol. 9] at an attractive firm price. I told him I was not interested in bargaining with him; I emphasized that if we met to discuss the matter he should be prepared to name his price and I would either accept or reject it.

6. As a result of the foregoing telephone conversation, on May 28, 1959 I met with Mosman in his suit at the Drake Hotel in Chicago. He offered to sell the H-H-M business to Diebold for $3,000,000 cash subject to certain minor incidental terms. I accepted his offer. At that meeting I told Mosman I wanted him to run the H-H-M business after its acquisition by Diebold. I intended then, and I have always intended, that the business of H-H-M would be continued, that its line of products would be sold under its trade name, and I anticipated that Mosman would act as General Manager of H-H-M. Mosman agreed to continue to manage the business of H-H-M.

7. On June 8, 1959 D. A. Crawford, Secretary of Diebold, and A. B. Arbaugh, Diebold's counsel in Canton, Ohio, met with Mosman and his wife in Chicago at the offices of Winston, Strawn, Smith & Patterson (herein called "Winston Strawn") to reduce our agreement to a written formal contract. Winston Strawn were the attorneys for H-H-M and Mosman and A. J. Moody, a partner of that firm, acted as counsel for H-H-M and Mosman at that meeting.

8. On June 8, 9 and 10 the lawyers, in conjunction with Mosman and his wife, worked on drafting the Option and the Agreement of Purchase and Sale (herein called the "Purchase Contract") as well as on the Employment Agreement with Diebold and Mosman. The work of drafting was taken up again on June 15, 1959; and all of these meetings took place at the offices of Winston Strawn in Chicago.

[fol. 10] 9. On June 16, 1959 the Option (to which the Purchase Contract was attached) was signed by H-H-M and Mosman personally and by Diebold. The execution of the Option by Diebold had been authorized by its Board of Directors and it was represented to us that the Board of Directors of H-H-M had likewise authorized its execution in its name by its officers. The Option provided that it had to be exercised on or before July 31, 1959; and it also provided that the Purchase Contract annexed thereto would be signed by the parties within two days after Diebold notified H-H-M of its exercise of the Option.

10. Mosman covenanted in the Option that he would cause a shareholders' meeting of H-H-M to be called and that he would vote the 88% of the outstanding stock of H-H-M owned by him in favor of approval of the sale of H-H-M's business to Diebold. I am informed that under Ohio law a transaction of this type requires the affirmative vote of holders of two-thirds of the outstanding stock; therefore, it is apparent that Mosman's covenant to vote his 88% of the stock in favor of the transaction was tantamount to obtaining stockholders' approval.

11. On the same day the Option was executed—June 16, 1959—Diebold and Mosman signed Mosman's Employment Contract. This recited that Diebold desired to employ Mosman "in connection with the business of the Herring-Hall-Marvin Safe Company." The contract provided for Mosman's employment for nine years at a salary of $50,000 a year for the first five years and at a salary of $25,000 for the last four years.

12. Thereafter and prior to the end of June 1959 Diebold obtained from its bondholders the requisite approval to acquire the business of H-H-M and completed its arrangements to obtain the financing necessary to consummate the transaction. On June 29 and 30 Frank D. Robinson, a Vice President of Diebold, inspected the plants of H-H-M and

made an on-the-site observation with respect to materials on hand, etc.

[fol. 11] 13. On June 30 or July 1, 1959 I telephoned Mosman and told him I was ready to exercise the Option and to sign the Purchase Contract on behalf of Diebold. Mosman told me he was leaving for Lake Placid, New York the next day and he asked me to refrain from exercising the Option until his return from Lake Placid the following week. I acceded to his request.

14. On July 9, 1959 it came to my attention that as a result of an inadvertent remark made by one of Diebold's outside directors, the fact that Diebold had on Option to buy the business of H-H-M became known. I was cognizant that Mosman was anxious that the transaction for the sale of H-H-M's business be kept confidential and, therefore, I thought it would be desirable to tell Mosman what I had learned. Accordingly, I telephoned Mosman at Lake Placid and told him of this occurrence. He received the news and gave no indication whatsoever that he intended to use it as a pretext for the action he subsequently took.

15. On the afternoon of the same day, namely July 9, 1959, I received a telegram from the lawyers for H-H-M which in substance purported to terminate the Option for "alleged breach of agreement." I immediately telegraphed the attorneys for H-H-M and also telegraphed Mosman personally denying that there had been a breach and insisted on performance of the Purchase Contract. In subsequent conversations that I had with Mosman, the only alleged breach he ever suggested or intimated was that word of the existence of the Option had inadvertently been revealed. I told him he had no basis for asserting that this action was a breach of the Purchase Contract and that he was obviously standing on this incident as a pretext for not going through with the deal. It is appropriate to indicate that at no time during this period did any newspaper, periodical or trade journal or any other publication carry any news of the existence of the Option.

[fol. 12] 16. On July 9 and 10 I telegraphed Mosman and attempted to reach him by phone at Lake Placid because I wanted to discuss the matter with him before bringing any legal action for breach of contract if he persisted in his view that he would not go through with the Contract.

17. On July 11 I went to Lake Placid and talked with

Mosman and at that meeting he said the Option was cancelled because a director of Diebold had been responsible for a "leak." Despite my protest, Mosman insisted that "this contract is off"; however, he said that perhaps we could renegotiate and make a new deal. We agreed to meet in Cincinnati on the following Wednesday, July 15.

18. On Wednesday, July 15, I met with Mosman and his wife in Cincinnati for three or four hours. He sought to induce me to cancel the Contract; he said he was going to fight and that he was not going through with the Purchase Contract. I told him under no circumstances would I cancel the Contract; I said that we were going to serve notice of the exercise of the Option forthwith and if he refused to perform under the Purchase Contract, Diebold would sue to enforce it. I then made the necessary arrangements for the service of notice of our exercise of the Option on H-H-M and this was done on July 15. The Option required that the Purchase Contract be executed within two days after service of this notice and, accordingly, on July 17—two days after we served notice of our exercise of the Option—Mosman and I met in Chicago at the offices of Winston Strawn. Mosman again reiterated that he would fight if Diebold insisted on his performing the Purchase Contract; however, after some discussion he finally said he would go along if we made certain changes in the Purchase Contract and in his Employment Contract favorable to him personally and to H-H-M.

19. In a desire to avoid litigation, I reluctantly agreed to discuss the revisions he insisted on making and we finally [fol. 13] agreed to amend the Purchase Contract to require Diebold, rather than the stockholders of H-H-M, to bear any liability that might accrue on account of renegotiation of government contracts. I also agreed that the closing date would be changed from July 31 to August 31, 1959; correspondingly, a change was made in the date when Mosman would be required to call a stockholders' meeting of H-H-M at which he was obligated by the Purchase Contract to vote his 88% of the stock in favor of the sale. As amended, the Option provided that the notice of the stockholders' meeting would be mailed not later than August 20 and the stockholders' meeting would be held on August 28 in order to permit a closing on August 31.

20. I also agreed to a modification in the Employment

Contract with Mosman. He wanted an unlimited expense account but, after considerable discussion, we signed an addendum to the Employment Contract under which Diebold agreed to pay Mosman's expenses incurred in connection with his duties as General Manager of the H-H-M organization and, at Mosman's insistence, we agreed to pay his dues at the following clubs: Queen City Club (Cincinnati), Hamilton City Club (Hamilton, Ohio) and Browns' Run Country Club (Middletown, Ohio).

21. After this meeting in Chicago, Mosman left for a holiday in Maine. I was unable to have him make available to us the information from H-H-M which we needed, such as titles to property, income statements, balance sheets, insurance coverage, fixed asset inventories, property records and other relevant data; although the Purchase Contract contemplated that this would be done.

22. At various times between July 17, 1959 and the events of August 11, 1959, hereinafter set forth, I obtained information indirectly to the effect that Mosman was still of a mind not to honor the obligations imposed upon H-H-M and himself by the terms of the Option and Purchase Agreement.

[fol. 14] 23. On August 6 the Antitrust Division of the Department of Justice sent a letter to Diebold which it characterized as an inquiry arising out of information it had received that Diebold intended to acquire the business of H-H-M. The letter expressly stated that the Department did not intend to imply that the transaction was illegal; they merely wanted information concerning the proposed transaction. I understand that a letter of identical import was sent to H-H-M. When the letter of the Department was sent, I was with my family in Upper New York State and I learned of the letter on August 11 whereupon I immediately called Mosman who was still in Maine. Mosman told me he did not intend to go through with the transaction contemplated by the Purchase Contract and this time he rested his intention to breach the contract on the pretext that the Department of Justice had made an inquiry with respect thereto.

24. After talking to Mosman I instructed Diebold's lawyers to prepare the necessary legal papers for an action against Mosman and H-H-M to compel them specifically

to perform their agreements because I was convinced, on the basis of the various attempts previously made by him to get out of the Purchase Contract that he was in fact now going to use the inquiry from the Justice Department as a new pretext for not performing the Purchase Contract. I am advised that on August 17, 18 and 19, prior to the time when the Justice Department filed its action herein and obtained an ex parte temporary restraining order—on August 24, 1959—Mosman was in Washington collaborating and working with the attorneys of the Antitrust Division of the Justice Department in an effort to convince the Justice Department to bring an action that would give him a basis to avoid his obligations under the Purchase Contract. I am convinced that Mosman's purpose and design was deliberate and premeditated to induce the Justice Department to bring this action and to seek a restraining order and an injunction which would afford him a pretext to avoid his contractual obligations.

[fol. 15] 25. Upon my instructions, our attorneys, Messrs. Arnold, Fortas & Porter visited the Justice Department on August 11 and offered them complete cooperation. They arranged to deliver the requested information to the Justice Department on and after September 1 and received assurances that this time schedule would be acceptable. Neither then nor at any other time prior to the commencement of this action and the ex parte application for the temporary restraining order did the Justice Department or any official thereof advise Diebold or its lawyers that this action was going to be filed or that the arrangements worked out with Diebold's lawyers were no longer considered satisfactory. Moreover, neither Mosman nor his lawyers at any time revealed to anyone connected with Diebold that Mosman had collaborated and worked with the Justice Department or that he had attempted to induce the Justice Department to bring this action.

26. If the notice to stockholders of H-H-M had not been mailed in accordance with the Purchase Contract on or before August 20, it was Diebold's firm determination to bring suit immediately against H-H-M and Mosman for breach of contract. Mosman was advised of this fact. Evidently recognizing the validity of Diebold's position, Mos-

man caused H-H-M to send a notice to its stockholders on August 20 for a meeting to be held on August 28 to consider the sale of its assets to Diebold pursuant to the Purchase Contract. However, the notice stated that no action would be taken at the August 28 meeting but instead the notice stated that because of the receipt of the letter from the Department of Justice, the meeting would be adjourned "to allow the seller time to resolve the uncertainties raised by the letter of the Department of Justice." The stockholders' meeting was convened on August 28 but, pursuant to the predetermined plan, it was recessed without date [fol. 16] subject to being reconvened on seven days' notice. My lawyers have informed me that this would constitute a breach of the Purchase Contract by H-H-M and Mosman and of their respective obligations thereunder except for the temporary restraining order issued by this Court on the government's application, without notice, on August 24.

II

27. Should Diebold acquire the business and properties of H-H-M, it would be its fixed policy to continue the business and operations of H-H-M as a going concern. This would include the continued marketing of H-H-M's products under its own trade name; and the maintenance of its managerial, operating, selling and servicing personnel both at its headquarters in Hamilton, Ohio and in the field. In short, H-H-M would be operated as a distinct and separate entity competing with the many other enterprises now in competition with H-H-M.

28. In the highly competitive areas in which Diebold operates, it has been for many years and still is at a distinct disadvantage competitively. This is so because Diebold does not now produce a more diversified and complete line of products. This disadvantage is further aggravated by Diebold's lack of additional manufacturing plant and facilities, the need for which is pressing. The acquisition of H-H-M's facilities will provide the much needed plant space plus a more complete product line and will permit the operations of Diebold and H-H-M to be coordinated with resultant economies; thereby it will become possible for both Diebold and H-H-M to compete more effectively with their

many competitors among whom are Sperry Rand Corporation, Shaw-Walker Company, Mosler Safe Company and many others.

29. If the transaction contemplated by the Purchase Contract should not be consummated, Diebold will be denied [fol. 17] the benefits enumerated above; moreover, it will suffer irreparable injury for, indeed, it cannot elsewhere obtain the plant, facilities, services and personnel which will be made available to it by the acquisition of the business of H-H-M. In this connection it is most significant to indicate that the Purchase Contract, in paragraph Sixth thereof, provides that if the purchase and sale transaction should be prevented by a restraining order or an injunction effective for longer than 120 days from July 17, 1959, then in that event the Purchase Contract automatically terminates unless it be extended for an additional 120 days "by mutual agreement of the parties." There is not now an agreement by H-H-M to extend the Purchase Contract for an additional 120 days; and, in fact, the circumstances set forth above demonstrate clearly that Mosman will never agree to an extension. This means, in effect, that the Contract will expire by its terms on or about November 15, 1959.

30. I am advised by our attorneys that the preparation of this lawsuit for trial will require many months; I am also informed by our attorneys that this lawsuit will in all probability not be adjudicated finally or or before November 15, 1959. Under these circumstances it is manifest that a preliminary injunction, if granted, will effectively and irrevocably terminate the Purchase Contract and both the government and Mosman will have achieved all the relief that they could possibly hope to obtain after a trial on the merits. As a direct consequence of such action, Diebold will have suffered irreparable damage because it will have irretrievably lost its contract rights and the benefits accruing to it thereunder; and more importantly Diebold will have been denied the opportunity of resisting the claims of the government in a trial on the merits—a right which should not be denied to any citizen.

[fol. 18] 31. In sum, the facts and circumstances disclosed in this case demonstrate beyond any peradventure of a doubt that the granting of a preliminary injunction would injure Diebold irreparably; in contrast, the denial

of the preliminary injunction will not preclude the government from proceeding to a trial on the merits without injury to the government's case.

III

32. It is important to note that Diebold is basically a fabricator of steel, producing different lines of office equipment used by federal, state and municipal agencies and a wide range of commercial establishments including financial institutions, insurance companies, hotels, theaters, manufacturing concerns and offices of every description employing office systems equipment. This equipment, whether manual or automatic, is largely tailored to the needs of a particular office for controls, billings, invoices, inventories, and other accounting and clerical work. In the production of these systems Diebold also makes the cards, guides, tabs and attention-flagging devices as well as other stationery requirements necessary to adapt particular office equipment to a particular office function. It is apparent, therefore, that the types of equipment manufactured by Diebold are extremely diffuse and range from simple open face shelving to complex insulated automatic record desks, record safes, and chests, motorized files, safe deposit boxes, record storage equipment, night depositories, drive-up windows, tab card handling equipment, burglar alarms and related products. Any effort to categorize such equipment loosely as bank equipment is wholly misleading because a bank is primarily an office, and many offices, banking and otherwise, have precisely the same need to secure and protect records, papers and other valuables.

33. H-H-M, I am informed, also fabricates steel into a diverse line of office equipment for facilitating the handling, [fol. 19] storing, maintaining and protecting of files, records, papers, securities and valuables. As a matter of fact, H-H-M manufactures many items of equipment which Diebold does not produce; among them are insulated and security files, electrically operated vault doors, bank counter and under-counter equipment, bank cash busses, field safes, blast doors, radiation shielding doors, specially engineered products for the nuclear field generally and fire resistive double doors.

34. The customers of both Diebold and H-H-M represent

every conceivable type of industrial, commercial and governmental office including all kinds of financial institutions such as banks, savings, and loan associations, credit and loan companies, insurance companies, hotels, supermarkets, department stores and all types of governmental agencies and most industrial establishments, both plant and office.

35. In its complaint the Government alleges that "Diebold is one of only three companies engaged in the manufacture and sale of bank vaults and bank vault doors in the United States." This statement is not true. Neither Diebold nor H-H-M manufactures bank vaults. Building a bank vault is an on-the-site construction job in which neither engages. Moreover, as hereinafter set forth, there are at least five companies in the United States that manufacture large or heavy vault doors used in some banks, insurance companies, savings and loan offices and industrial establishments and there is also a major English company, Chubb Safe Co., which manufactures heavy vault doors that are offered for sale in the United States. Additionally, there are many other companies making fire resistant vault doors, large safes and chests and other equipment competitive with the heavy vault door. Many users, including savings and loan offices, insurance companies, banks and commercial and industrial establishments, prefer this lower cost equipment rather than the heavy vault doors which are more expensive.

[fol. 20] 36. Many of the products which Diebold makes for use in offices of banks, business and government, such as card record files and systems, binders, cabinets, card trays, etc., Diebold sells in competition with dozens of other companies. The names of many of these competitors can be found in any trade journal dealing with office equipment or in the classified telephone directory of any major city.

37. The products to which the complaint appears to be related, including products made by Diebold and H-H-M, and their principal competitors in each of these items, are as follows:

Safes, Chests and Fire Doors

The Mosler Safe Company
Remington Rand (Sperry Rand) (Victor Safe Company)

Meilink Steel Safe Co.
Schwab Safe Company
Guardell—Trade name of Art Steel Co.
Gardall Corporation
John D. Brush Safe Co.
Valentine Safe Company
Guardsman Safe Company
Shaw-Walker Co.
Mid-Western Manufacturing Corporation
Benston Manufacturing Co.
Hegeo
Craig—Le Febure Corp.
Brush—Punnett Safe Company
Garry Safe Company
Star Machine Company

Bank Vault Doors

The Mosler Safe Company
Hermann Safe Co.
Chubb (England)
Peco (Protection Equipment Co.)

Linings

The Mosler Safe Company
Hermann Safe Co.
Martin B. Morris Co. (Dealer as to certain products—but manufactures Linings)
Many steel fabricators can and do build and install vault lining

[fol. 21] Safe Deposit Boxes

Gross-Feible Co.
American Bank Equipment Co. (now Smith-Wheelox)
Security Safe Deposit Box Co.
Peco
Hegeo
The Mosler Safe Company

Lockers

Hermann Safe Company
American Bank Equipment Co.
Gross-Feible Co.

Martin B. Morris Co. (Dealer—as to certain products but manufactures Lockers.
The Mosler Safe Company
Murry Safe Company (Dealers—as to certain products but manufactures Lockers.
Florida Safe Service Inc.

Drive-In Windows—Drive Ups—Drive-Up Counters

Protection Equipment Co. (Peco)
American Bank Equipment Co.
The Mosler Safe Company
Gross-Feible Co.
Florida Safe Service Inc.
Hegco Industries Inc.

Depositories

The Mosler Safe Company
Protection Equipment Co. (Peco)
American Bank Equipment Co.
Gross-Feible Co.
Florida Safe Service Inc.
Hegco Industries, Inc.

Insulated Files—Security Files

The Mosler Safe Company
Remington Rand (Victor)
Shaw-Walker Co.
Schwab Safe Co.
Murphy Elevator Co.
Mid-Western Manufacturing Corp.
Meilick Safe Company

Principal Service Companies

Mosler Lock Company, Covington, Kentucky
Yale & Towne, Stamford, Conn.
Hermann Safe Company, San Francisco, Calif. (Operates in California, Oregon, Washington, Idaho, Nevada, Utah & Arizona)
Bank Vault Inspection Company, Philadelphia, Pa.
Fink Safe & Lock Company, Chicago, Ill.
Tobe Monday, St. Louis, Mos.
[fol. 22] Hain Safe Company, Columbus, Ohio

F. E. Davenport Company, Omaha, Nebraska
Protection Equipment Company, Minneapolis, Minnesota
Stockwell Lock Inspection Company, Los Angeles, Calif.
Many local businesses

Burglar Alarms

American District Telegraph Company
Holmes Electric Protection Company
Protection Equipment Company
Duplex Alarm Company, New York, N. Y. (Division of Mosler)
Federal Alarms, Inc., San Francisco (Division of Hermann Safe Co.)
Padua Alarms Systems, Inc.
Bankers Electric Protective Association
Smith Detective Agency & Night Watch Service, Inc.
Owl Protective Company, Inc.
Robinson Electronic Supervisory Co., Inc.
Newark District Telegraph Company
Morse Signal Devices, Inc.
Michigan Burglar Alarm Co.
Walnut Hills District Telegraph Co.
Potter Electric Signal & Manufacturing Co.
Metropolitan Electric Protection Co.
Protection Engineering Corporation
Rhode Island Electric Protective Co.
Merchants Police Signal & Alarm Co.
McCane-Sandoe Detective Agency & Burglar Alarm Co.
Kedzie Protective Patrol
General Alarm, Inc.
Federal Engineering Company, Inc.
Electro Protective Corp.
Denver Burglar Alarm Co.
Dayton Electronics Alarm & Signal Co.
Central Watch Service, Inc.
Central Station Signals, Inc.
Central Alarm Company, Ltd.
Central Alarm, Phoenix, Arizona
Calls Police Signal Corp., Boston, Mass.

1. Smith-Wheelox Corp.—Toledo Ohio (organized in 1958 as the American Bank Equipment Company)

Safe Deposit Boxes
Lockers, Bank Type
Night Depository Chests (heads bought from Chubb)
Bank Rearrangement and Moving
Second-hand Bank Vault Doors
Resells Chubb Vault Doors

2. Security Safe Deposit Company, Anaheim, California (started in 1954, per D & B)

Safe Deposit Boxes

[fol. 24] 3. Protection Equipment Company—Minneapolis (started in 1947, per D & B)

Bank Vault Doors
Safe Deposit Boxes
Drive-in Windows
Depositories

4. The Chubb Safe Company—Great Britain

Bank Vault Doors, Depositories, Inc.

5. Herman Safe Company, which has recently produced bank vault doors. For example, Herman recently produced and delivered eighteen 3½" doors to the Bank of America

6. Vitzer—Miami

Drive-up Windows—Night Depositories

7. Hegeo—Indianapolis

Drive-up Windows
Depositories
Safes and Chests

41. Apart from the competition that is and will continue to be generated by the domestic new companies which have

entered the field, the competition in the United States market offered by Chubb Safe Co. of England is an important factor to be reckoned with, particularly as labor and material costs continue to increase in this country.

42. In conclusion, and in order to clarify the record, I desire to comment briefly on a few matters raised by Government's counsel in his examination of certain witnesses on oral deposition:

(a) Diebold has developed, engineered and produced working models of a vault door electrically operated which, in its opinion, does not infringe on any known outstanding patents of others. Diebold has concluded, however, that the customer demand for this type of a vault door has not yet been created in sufficient quantity to justify the investment in tooling necessary for the production of electrically operated vault doors. [fol. 25] (b) It is not true that Diebold makes its own combination locks for bank vault doors; to the contrary, 100% of its requirements for combination locks in the manufacture of bank vault doors are purchased by Diebold from an outside supplier. In addition, Diebold purchases combination locks from other suppliers as components in the assembly of many of its products.

(c) I have caused to be made a cursory check of some of the relevant publications and a partial list of advertisers therein who make equipment competitive with the products of Diebold and H-H-M that are sold to banks, savings and loan institutions, office equipment dealers and others. A tabulation showing the names of these publications and of the advertisers is attached to this affidavit as Exhibit 1 and made a part hereof.

Raymond Koontz.

Subscribed and sworn to before me this 1st day September, 1959.

Ethel L. Abbott, Notary Public, Hamilton County, Ohio.

My Commission expires Sept. 13, 1960.

[fol. 26] EXHIBIT 1 TO AFFIDAVIT OF RAYMOND KOONTZ

Advertisers of Safes and Bank Equipment

"Geyers—Who makes it and where"—1959 catalog:

p. 131—Victor—Remington Rand—Safes
p. 204—Victor—Insulated Files
p. 132—Mid-Western Manufacturing Corp—Safes, chests, insulated files
p. 205—John D. Brush Co.—Safes
p. 237—The Acorn Company—Fire resistant security vaults

U. S. Investor: 5/9/59 issue, p. 24—A.D.T. system product burglar alarm for bank vaults

The Office: 5/59, p. 278—Schwab Safe Company, Safes
5/59, p. 276—Meilink Safe Co., safes and insulated files
12/58, p. 154—Bentson Mfg. Co., safes

Office Appliances: 8/59, p. 169—Murphy Mfg. Co., insulated files

U. S. Investor: 4/58, p. 54—Quality Products Co., Vault Storage Lockers

Mid-Continent Banker: 6/59, p. 15—Hegeo,
Drive-up windows
A/H Depositories
Vault Ventilators
Safe Deposit Boxes
Burglar Alarms
Counter Equipment
Teller
Fire Resistant Products

Eastern Banker: 8/1/59, p. 19—Wilkinson Assoc., Mobile cash units

Burroughs Clearing House: 8/59, p. 32—Peco, Drive-in windows
6/59, pp. 60-61—LeFebure Corp., insulated desks

U.S. Investor: 3/21/59, p. 54—Yale & Towne, Locks

Nations Business: 7/59, p. 15—Rem. Rand. insulated safe files

Office Appliances: 3/59, p. 124—Meilink, safes
The Office: 2/59, p. 3—Shaw-Walker, insulated files
Savings & Loan News: 3/59, p. 38—Peco:

Vault Doors
S/D Boxes
Walk-up Windows
Drive-in Windows
Night and Day Depositories

Burroughs Clearing House: 12/58, p. 26—Chubb, Vault doors

[fol. 27] Thomas Register: 1957 Edition, p. 7840:

Vaults-Bank, fire and burglary resistive
Herman Safe Co., San Francisco
Mills Mausoleum Equip. Corp., New York
Watson Mfg. Co., Jamestown, N. Y.
Gross Feible
Bank Vault Inspection Co., Phila.
Wheeling Corrugating Co., Wheeling
Tammi Safe & Vault Co., Milwaukee
The Mosler Safe Company
Diebold, Incorporated
Herring-Hall-Marvin Safe Company

Thomas Register: Dec. 1, 1957—*Safes:* Fire & Burglar Resistive, P. 6036

In-Floor Safe Co., Los Angeles
Johnson-Pacific Safe Co., Richmond, Cal.
Herman Safe Co.
Ray-Proof Corp., Stanford, Conn.
Busse Safe & Vault Co., Chicago
Schwab Safe Co., Indiana
Shaw-Walker Co., Michigan
Cramer Safe & Office Equip. Co., Kansas City
National Chair & Furniture Co., St. Louis
Cary Safe Sales Corp., Buffalo, N. Y.
Condon Safe Co., Buffalo, N. Y.
Gardall Corporation, East Syracuse, N. Y.
Empire Safe Company, NYC

Mutual Distributing Co., NY
Remington Rand
John D. Brush, Rochester
Gross Feibel Co.
Melich Steel Safe Co., Toledo
Municipal Metal Furniture Co., Manitowoc, Wis.
Tamml Safe & Vault Co., Milwaukee, Wis.
Diebold, Incorporated, Canton
Mosler Safe Co., Hamilton
Herring-Hall-Marvin Safe Company, Hamilton

[fol. 28] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF WARREN MOSMAN AS TO POSITION OF HIMSELF INDIVIDUALLY AND AS AN OFFICER AND SHAREHOLDER OF HERRING-HALL-MARVIN SAFE COMPANY—Filed September 1, 1959

STATE OF OHIO,
County of Hamilton, ss:

WARREN MOSMAN, being first duly sworn, deposes and says that:

(1) He is President of Herring-Hall-Marvin Safe Company, an Ohio corporation. He owns approximately 90% of the outstanding stock of Herring-Hall-Marvin.

(2) He has read the motion, memoranda and various affidavits filed and to be filed by Diebold, Inc., including the affidavit of Raymond Koontz. While he believes that such documents contain a number of erroneous statements in regard to the industry in which Diebold, Inc. and Herring-Hall-Marvin participate and the competition thereof, he is particularly concerned by the erroneous statements made as to his position in regard to the option and purchase con-

tracts entered into between Diebold, Inc. and Herring-
[fol. 29] Hall-Marvin and the employment contract entered into between Diebold, Inc. and himself. To correct these statements he believes he should make this statement of his position individually and as an officer and shareholder of Herring-Hall-Marvin Safe Company.

(3) For sometime he has had considered the possibility of selling his interest in Herring-Hall-Marvin because of the problems that might arise in the event of his death. He had always felt that if he should decide to sell his interest he wanted the same opportunity afforded all other shareholders of the Herring-Hall-Marvin Safe Company. From time to time he was approached by various prospective purchasers, including Diebold, Inc., but he did not reach a definite conclusion to sell the business to Diebold, Inc. until execution of the option agreement June 16, 1959, with Diebold, Inc. He executed such option agreement in good faith and with full intention of performing all provisions of such option agreement and the contract of sale and employment contract subsequently entered into.

(4) Because rumors of the sale might create a chaotic condition in his business, he requested that the arrangement be treated confidentially and there was inserted in the contract a provision to this effect. As admitted by Mr. Koontz in his affidavit, one of Diebold's directors then caused this information to be made public. Thereafter, affiant spoke to his attorneys who sent a wire advising Diebold, Inc. that the contract had been terminated by reason of Diebold's violations of its agreement.

Subsequently, as Mr. Koontz recites in his affidavit, [fol. 30] meetings were held in Chicago and affiant was persuaded to waive the violation of its agreement by Diebold and at such time Diebold, Inc. made two or three minor modifications of the contract as recited in Mr. Koontz's affidavit. Affiant as an officer of Herring-Hall-Marvin then executed the contract of purchase and sale in good faith and with every intention of carrying it out.

(5) Said contract contains a paragraph referred to by Mr. Koontz in his affidavit which provides that the contract shall terminate within 120 days from July 17, 1959, if the consummation of the sale is prevented by an injunction or restraining order. The first draft of the contract was drawn up by Diebold and its attorneys. A provision substantially similar to the aforesaid provision was included by Diebold in its said first draft and was perpetuated in the contract by Diebold, presumably for its own protection.

(6) On or about August 10, 1959, Herring-Hall-Marvin received an inquiry from the Department of Justice as to the proposed sale to Diebold, Inc. This was the first contract Herring-Hall-Marvin or any of its officers or employees had from or with the Department of Justice, or indication that the Department of Justice questioned said contracts.

After discussion with his attorneys, affiant decided to go to Washington with his local counsel, Cyrus Fitton, of Hamilton, Ohio, and discuss the matter with the Department of Justice. The Department of Justice officials asked certain questions in regard to the business done by Herring-Hall-Marvin and by Die-
[fol. 31] bold, Inc., and advised affiant that in their opinion there was no question but that consummation of the agreement of purchase by Diebold, Inc. would constitute a violation of the antitrust statutes. At these meetings affiant told the Department of Justice that in accordance with the contract he intended to call the meeting of shareholders.

(7) After his visit with representatives of the Department of Justice affiant consulted with his counsel located in Chicago and on their recommendations sent to all shareholders a notice of the meeting as drafted by them in accordance with the copy thereto attached.

(8) The position of the affiant individually and as an officer and shareholder of Herring-Hall-Marvin Safe Company is that the agreements with Diebold, Inc. were entered into in good faith and as such will be fully carried out by him if they are legal; that subsequent to their execution very serious question has been raised as to their legality and it is his earnest

desire that the Court decide this question at the earliest possible time. It is the further position of affiant that a delay in decision of the question will seriously disrupt the business of Herring-Hall-Marvin Safe Company and cause irreparable harm to it and its employees. If these contracts are violative of the antitrust statutes or if the sale is enjoined through November 16, 1959, and the contract becomes a nullity in accordance with the provision of the contract inserted by Diebold, Inc. it is the present intention of the affiant to continue the ownership of the business and to cause its operations [fol. 32] to be successful as possible. If this Court should decide that the contracts are legal or that there is insufficient question of illegality to continue the restraining order in effect until November 16, 1959, affiant will do his utmost to have such contracts carried out and performed.

Warren Mosman.

Subscribed and sworn to before the undersigned, a Notary Public in and for the State and County aforesaid, this 2nd day of September, 1959.

Doris A. Furthmiller, Notary Public.

Doris A. Furthmiller, Notary Public, Hamilton County, Ohio.

My Commission Expires Sept. 27, 1960.

[fol. 33] ATTACHMENT TO AFFIDAVIT

August 20, 1959.

Notice of Special Meeting of Shareholders of Herring-Hall-Marvin Safe Company to be Convened August 28, 1959

Notice is hereby given that a Special Meeting of the shareholders of Herring-Hall-Marvin Safe Company, an Ohio corporation, (herein called the "Company") will be convened at Room 1400, 38 South Dearborn Street, in the City of Chicago, Illinois on the 28th day of August, 1959 at the hour of 11:00 a.m., Central Daylight Saving Time,

for the purpose of (i) considering a proposed sale of the Company's assets, business and properties to a financially responsible corporate purchaser (pursuant to the terms of an Agreement of Purchase and Sale dated July 17, 1959 which is subject to approval by the Company's shareholders) for three million dollars ($3,000,000.00) in cash plus the assumption by the purchaser of substantially all of the liabilities of the Company; and (ii) changing the name of the Company, all as specifically provided in the Agreement of Purchase and Sale. Said Agreement provides for consummation on August 31, 1959.

The Company has received a letter dated August 6, 1959 from the Department of Justice requesting detailed information as to the sale, the Company, the purchaser and other companies in the industry. This letter, therefore, raises a question as to the application of the Federal antitrust laws to the sale.

In view of this letter the Company intends to convene such meeting on August 28, 1959; and, thereupon, adjourn it without action; and to continue to adjourn such meeting from time to time thereafter, but in no event beyond November 16, 1959, in order that an effort may be made by the purchaser to resolve the uncertainties raised by the letter of the Department of Justice.

The Company will advise the shareholders as to all developments with respect to the above matters before the shareholders' meeting is reconvened for action.

By Order of the Board of Directors Herring-Hall-Marvin Safe Company, By: Warren Mosman, President.

WM:gll

[fol. 34] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

DEPOSITION OF WARREN MOSMAN—August 29, 1959

Deposition of Warren Mosman, a witness called on behalf of the plaintiff, pursuant to notice given after application had been made to the Court under Rule 26 (a) for leave to take depositions, and order of Court, and stipulations of counsel hereinafter set forth, at 603 Dixie Terminal Building, Cincinnati, Ohio, between the hours of 10:30 o'clock A. M. and 5:20 o'clock P. M. on Saturday, August 29, 1959, before Robert I. Crawford, a notary public in and for the State of Ohio.

[fol. 35] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice and Larry L. Williams, Attorney, Department of Justice.

For the Defendant Diebold, Incorporated: Arnold, Fortas & Porter by Abe Fortas, Esq., and Victor H. Kramer, Esq. and Milliken, Reister, Fitton & Latimer by Frederick A. Reister, Esq.

For the Defendant Herring-Hall-Marvin Safe Company: Taft, Stettinius & Hollister by Murray S. Monroe, Esq.

[fol. 36] STIPULATIONS

It is stipulated by and between counsel for the respective parties that any exhibits marked for identification by the parties during the taking of these depositions may be retained in the custody of the attorney having the exhibit marked.

Mr. Toohey: Let it be noted on the record that the deposition of Mr. Mosman was taken pursuant to notice given after application had been made to the Court under Rule 26 (a) for leave to take depositions and order of Court and was then by agreement adjourned to 603 Dixie Terminal Building.

Call Mr. Warren Mosman. Will you swear him?

STATEMENT BY MR. FORTAS

Mr. Fortas: Mr. Toohey, before you begin the examination of Mr. Mosman, I would like to make a statement for the record with respect to Mr. C. L. Hardin and Mr. Arthur Fille.

Notices of taking the depositions of those two men were served upon us by counsel for the plaintiff some days ago. The depositions were to be taken pursuant to order of the Court entered herein on August 24.

The application to take the depositions of those two men was made by the plaintiff, and it was made on the basis of a sworn affidavit of plaintiff's counsel, Mr. Toohey. [fol. 37] The application and affidavit were filed and the order of Court entered on the same day, namely, August 24.

The application for leave to take the depositions of Mr. Hardin and Mr. Fille was necessary because of the provisions of Rule 26(a), requiring a special showing of need for the taking of depositions by the plaintiff before the lapse of 20 days after the filing of the complaint.

I should like the record to show that on the evening of August 23 my partner, Mr. Victor Kramer, was notified by counsel for the plaintiff, Mr. Toohey, that the depositions of Mr. Hardin—I beg your pardon. The date is wrong. On the evening of August 27 my partner, Mr. Victor Kramer, was notified by Mr. Toohey that the depositions of neither Mr. Hardin nor Mr. Fille would be taken the following morning. I should have said that the depositions were noticed to be taken at 10:00 A. M. on the morning of August 28 in the United States Attorney's office in Cincinnati, Ohio.

At the time that Mr. Kramer on August 27 received word that the depositions of Mr. Hardin and Mr. Fille were not to be taken, I was in Cincinnati, Ohio. I had come to Cincinnati from Canton, Ohio, where the office of my client, Diebold, is located, on the afternoon of August 27 for the specific and only purpose of representing my client at those depositions.

[fol. 38] Following receipt of the information that I have heretofore recited, Mr. Kramer telephoned me—Mr. Kramer was then in Canton—and gave me the information.

I thereupon telephoned Mr. Toohey. He was not in his hotel room in Cincinnati at the time I telephoned, but he

later very kindly and courteously returned my call. I believe that was somewhere in the neighborhood of 10:30 o'clock on the night of August 27. Mr. Toohey affirmed to me that the depositions of Mr. Hardin and Mr. Fille would not be taken as scheduled

I thereupon informed Mr. Toohey that I would assume that it would be unnecessary for me formally to show up at the United States Attorney's office on the morning of August 28, and that by failing to do so I would not waive any rights that we might have in the premises.

I further informed Mr. Toohey that on behalf of the defendant Diebold I reserved all rights of whatever nature because of the fact that the plaintiff had noticed the depositions and had failed to take the depositions, including, as I told Mr. Toohey, our right to object to any subsequent depositions or any testimony of any nature whatever and in any form whatsoever by Hardin and Fille. And I want the record to show that we have made such reservation and do now repeat the reservation aforementioned.

[fol. 39] That's all. Thank you.

Colloquy Between Counsel.

Mr. Toohey: I would like to make a very brief statement following that of Mr. Fortas.

I would like to state for the record that to my knowledge on August 26, Wednesday, Mr. Victor Kramer, partner of Mr. Fortas, requested the Division to change the time for taking of depositions of Mr. Fille and Mr. Hardin to another hour during that day, a later hour.

Mr. Fortas: During the day of the 28th.

Mr. Toohey: That's correct. Mr. Kramer's request was made to the Division, not to me personally. I was in Washington on the morning of Wednesday, the 26th, when Mr. Kramer's request was made.

Mr. Fortas: Excuse me, sir. But wouldn't that be the 27th?

Mr. Toohey: Wednesday.

Mr. Fortas: I am sorry. You are right.

Mr. Toohey: It was not feasible for me at that time and place to make the changes Mr. Kramer requested.

During the day of Wednesday, August the 26th, I conversed with Mr. Kramer personally. He made substantially

the same request and also inquired as to how long I thought the depositions of Mr. Fille and Mr. Hardin would take. I informed Mr. Kramer that I could give him no answer as [fol. 40] to the length of time and that I could not at that time make any changes in the notice date. Mr. Kramer, I believe, left his phone number with the Division and requested that he be called and notified in case the deposition dates were changed in any way.

Wednesday evening I left Washington for Cincinnati. I arrived Thursday morning. I talked first with Mr. Hardin and then with Mr. Fille. Mr. Fille at that time over the telephone informed me that he had received an eye injury which would necessitate a trip to the hospital on Friday the 28th and asked whether under the circumstances I might change his notice date.

I agreed to this and, in view of the fact that Mr. Hardin's statement would not be lengthy, I decided also to move Mr. Fille's—Mr. Hardin's notice date. This done, I then called Mr. Kramer.

That's it.

Mr. Kramer: On the morning of Wednesday, August 26th, 1959 at approximately 10:25 A. M., in the office of Mr. Toohey's superior in the Antitrust Division, I orally requested Mr. Toohey to postpone the depositions of the two gentlemen from 10:00 A.M. to 2:00 or 2:30 P.M. on the same day.

Subsequently, about a half hour thereafter, I telephoned [fol. 41] Mr. Reycraft, Mr. Toohey's superior in the Antitrust Division, and repeated my telephone request. On Thursday, August the 27th, when Mr. Toohey called me at my hotel room at 10:30 P. M. Eastern Standard Time in Canton, Ohio, he informed me that the two depositions scheduled had been canceled.

I then made and since that time have made no further requests concerning scheduling of these two depositions, and Mr. Toohey did not ask counsel for Diebold to postpone the taking of these two depositions at that time or at any time thereafter.

Mr. Fortas: O. K., Mr. Toohey. Thank you.

Mr. Toohey: Are the statements from your side finished, Mr. Fortas?

Mr. Fortas: Yes.

Mr. Toohey: Thank you.

Mr. Fortas: May we clear—This is off the record.

(Discussion off the record.)

Mr. Toohey: Let it be noted that the Department is agreeable——

Mr. Williams: Briefly, that it is agreeable among counsel that, instead of taking the deposition of Mr. Koontz, president of Diebold, Incorporated, in Cleveland, his deposi-[fol. 42] tion will be taken in Cincinnati on the same date, same time.

Mr. Fortas: Thank you, sir.

Mr. Monroe: Do you want to take that here?

Mr. Williams: If it's agreeable to you. It's much more pleasant here.

Warren Mosman, called as a witness on behalf of the plaintiff, being by me first duly sworn, as hereinafter certified, to depose the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Direct examination.

By Mr. Toohey:

Q. Mr. Mosman, are you associated with the defendant firm, Herring-Hall-Marvin?

A. Yes.

Q. What is your position, Mr. Mosman?

A. An executive position. I am president.

Q. How long have you been president, Mr. Mosman?

A. About nine years; a little over nine years.

Q. Will you state briefly the nature of your duties as president of Herring-Hall-Marvin?

A. Well, actually, I am president and general manager, [fol. 43] and I direct the activities of the company.

Q. Do you in your capacity as president, general manager, solicit business, orders, for your firm?

A. Yes. I have quite a few accounts that I handle myself.

Q. Do you personally contact and meet with these customers? Is that correct?

A. Yes.

Q. How long has that been one of your duties?
A. Ever since I joined the organization.
Q. Where is Herring-Hall-Marvin located, Mr. Mosman?
A. 1550 Grand Boulevard, Hamilton, Ohio.
Q. And the full and correct name of the company?
A. Herring-Hall-Marvin Safe Company.
Q. Are you a stockholder, Mr. Mosman?
A. Yes.
Q. Are you the only stockholder?
A. No.
Q. Where is Herring-Hall-Marvin incorporated?
A. Ohio.
Q. Will you state where its principal office is located?
A. 1550 Grand Boulevard, Hamilton, Ohio.

[fol. 44] Q. Will you state, if you can at this time, the net assets of the corporation?

A. (Examining papers.) Our total assets are $4,244,183.37. Our net assets, net worth, is $2,313,441.30.

Q. Can you state the amount of net sales made by your company for the year 1958, or on any basis on which you maintain your books?

A. (Examining papers.) Net sales for 1958—this is June 30, 1958—was $10,301,559. At June 30, 1959 it was $10,142,927.

Mr. Fortas: May the record show that the witness, before making his last answer, consulted some sheets of paper. And I now ask that those sheets of paper be shown to us for examination. May I see them, please?

Mr. Toohey: May we have those identified first?

The Witness: Well, this is a photostatic copy of a series of balance sheets—profit and loss statements, rather.

Q. May I ask who prepared them, Mr. Mosman?
A. Our accounting department.
Q. And you have reviewed them?
A. Yes.
Q. To the best of your knowledge, they are accurate?
[fol. 45] A. Yes.

Mr. Toohey: We will have these two sheets marked for identification.

(Photostatic copy of a summary of profit and loss statements for Herring-Hall-Marvin Safe Company covering the years 1955, 1956, 1957, 1958 and 1959 was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Fortas: May I ask which one that is? Is that '58 that you have just marked or '59?

Mr. Toohey: May I ask that question of Mr. Mosman?

The Witness: There it is, right there (indicating). It starts right there, the next June, the next June and the next June.

Q. It covers the years '55, '56, '57, '58, through June 30th, '59. Are these two sheets identical, Mr. Mosman?

A. No. This (indicating) is the balance sheet over here.

Mr. Fortas: I beg your pardon. I didn't hear that answer.

Mr. Toohey: The second sheet is not identical. The second sheet is a balance sheet.

May I ask that be marked Exhibit 2 for identification?

[fol. 46] (Photostatic copy of balance sheet of Herring-Hall-Marvin Safe Company was marked Plaintiff's Exhibit No. 2 for identification.)

Q. Mr. Mosman, I would like to ask you whether in your opinion you consider that Herring-Hall-Marvin is a profitable company?

Mr. Fortas: Objection to the form of the question. That's not a proper question or proper answer. It's not the best evidence of the facts.

Q. Let me rephrase that question, or let me ask another one.

In your opinion do the sheets, the two sheets, show—do they reflect the profit picture of Herring-Hall-Marvin?

Mr. Fortas: Objection to the form of the question. It's not a matter of opinion. The sheets speak for themselves.

Q. Mr. Mosman, do not the two sheets marked Exhibit 1 and 2 for identification show the profit that Herring-Hall-Marvin——

Mr. Fortas: I'm sorry, Mr. Toohey. Objection, same grounds.

Mr. Toohey: You can answer that, Mr. Mosman, if you want to.

[fol. 47] Mr. Fortas: Just a moment, Mr. Mosman. It will be understood that I reserve my rights when I object, and you instruct the witness to answer nevertheless, and the witness does answer.

Mr. Toohey: Yes.

Mr. Williams: Yes.

Mr. Toohey: You may answer, Mr. Mosman.

A. The second sheet I gave you is a picture of our balance sheets for the years shown, and they all seem to be profitable. Those are audited statements, audited figures.

Q. What is the nature of the business conducted by Herring-Hall-Marvin?

A. We are a manufacturing company in the heavy metals work and also sheet metal work. We have a line of products which we manufacture, bank vault equipment.

Now, the bank vault equipment category covers bank vault doors, linings, safe deposit boxes, security and collateral lockers.

Mr. Fortas: I beg your pardon. Security and what?

The Witness: Security and collateral. Collateral.

Mr. Fortas: Oh, I beg your pardon. Thank you, sir.

A. (Continued.) —lockers, trust department lockers, [fol. 48] drive-in windows, night depositories and miscellaneous bank vault items; all of thos- items.

Q. Mr. Mosman, is this equipment you described and the products you have described sold to banks and financial institutions?

Mr. Fortas: Now, excuse me. I beg your pardon. But I am not sure the witness has completed his answer. Had you completed your answer, Mr. Witness?

Mr. Toohey: I think he had.

Mr. Fortas: The question was, "What is the nature of the business?" And he began describing his line of products, and I don't believe he has completed his answer.

Mr. Toohey: I would like for him to go ahead and answer this question. He can return.

Mr. Fortas: I object to that. I think the plaintiff has no right to ask a witness a question and then to interrupt in the middle of the answer.

I don't know whether the witness stated on the record —He nodded his head when I asked him whether it is true that he had not completed his answer.

Had you completed your answer?

Mr. Toohey: You needn't answer that question now, Mr. [fol. 49] Mosman.

Q. I believe the question I had asked you, Mr. Mosman, was whether the products you had thus far described are sold to banks and financial institutions?

A. That's right.

Mr. Fortas: My objection stands. The record will speak for itself.

Mr. Toohey: Yes.

Q. Are those the only products manufactured and sold by Herring-Hall-Marvin?

A. No.

Q. What other products are made and sold by the company?

A. As the name of our company would indicate, we manufacture safes, fire resistive safes, in all sizes. In that category we also manufacture money safes. There is a difference between a money safe and a fire resistive safe. We also manufacture fire resistive vault doors.

Q. Those are all the products made by Herring-Hall-Marvin?

A. No. We make other products.

Q. May I ask what those other products are?

A. We manufacture insulated files, which would be known as a filing cabinet that is insulated, or fire resistant. We [fol. 50] also make those files into security files until we have an insulated security file. And we manufacture, in small quantity, bank tellers' counter equipment.

Q. May I ask what is the nature of bank teller counter equipment? Is it a single product, a number of products?

A. Well now, you might say it's a category of a number of products. In other words, the category is bank tellers' counter equipment, but there are perhaps a dozen or 15 items we make in that category.

Q. Can you name some of these?

A. Well, pedestals. There are pedestals that you would find—If you were a teller, you would be working out of

some sort of a drawer back of a counter, and these are pedestals in which these drawers are located.

Q. Does your company make any products other than the ones you have described?

A. We also make atomic ray shielding doors, but it is a small business, small part of our business. We make some rotary record files, and that is a very small part of our business.

Mr. Fortas: I am going to object to the witness' characterization of what is a large part and what is a small part [fol. 51] of his business, and I now note that objection for the record.

Q. Have you now described to us, Mr. Mosman, all products made by Herring-Hall-Marvin?

A. I don't have a catalogue in front of me but I think I have spoken certainly of the major things that we manufacture. I may miss something.

Q. There may be others?

A. There may be some special job that we go through or something.

Q. Does Herring-Hall-Marvin sell products which it does not manufacture?

A. You, of course, are not talking about components that we buy?

Q. Let me clear my question. I have reference to what is generally known as a contract item that another company will make the product in its entirety and in form for use by the customer.

A. Uh-huh. In other words, are we distributors of any end products?

Q. Yes.

A. No.

Q. Going back now, Mr. Mosman, to some of the products you first mentioned: Can you state the volume of business done by Herring-Hall-Marvin in the manufacture and [fol. 52] sale of bank vault doors?

Mr. Fortas: For any particular period of time?

Q. I would like to tie that to a particular period of time. On the basis of your fiscal year or how your accounting is handled.

A. I don't have that figure available.

Q. Can you state in numbers or units the number of bank vault doors made and sold by Herring-Hall-Marvin for the year 1958?

A. Approximately I can. Three hundred.

Q. May I, Mr. Mosman, ask that question to be answered on the basis of the calendar year 1958? Does your answer stand at three hundred for the calendar year 1958?

A. Approximately.

Mr. Fortas: What was that answer?

The Witness: Approximately.

Mr. Fortas: Thank you.

The Witness: I don't have the figures here.

Q. Can you state how many bank vault doors were made and sold by your company for these eight months of 1959?

A. I would think—I don't have the figures. I would think eight-twelfths of three hundred.

Q. Mr. Mosman, can you give an estimate of the value of the bank vault doors sold in 1958?

[fol. 53] A. In our company?

Q. Yes.

A. I don't think I have anything on it, but I will see (examining papers). I may have something here.

No, I do not have that.

Mr. Fortas: May the record show that the witness consulted a paper at that point, and I now ask for an identification and the production of that paper for our examination.

Mr. Monroe: Let me see.

(Witness hands paper to Mr. Monroe.)

Mr. Monroe: I don't think he has any right to it. Do you care?

The Witness: Yes.

Mr. Toohey: Mr. Mosman hasn't used the paper. He has made no answer based upon it. I don't think it need be marked for identification.

Mr. Mortas: Will you identify that paper on the record, Mr. Mosman?

The Witness: Excuse me.

Mr. Fortas: Surely.

(Witness confers with Mr. Monroe.)

Mr. Monroe: I don't see that you have any right to a paper or the identification of it, Mr. Fortas. He didn't [fol. 54] use the paper.

Mr. Fortas: I regretfully state that I must disagree. Number 1, he did use the paper to say that he could not estimate the value. I am entitled to test that. Number 2, I am entitled to an identification of that document clearly in order that I may pursue my remedies so as to obtain that paper if it is not produced at this time. And number 3, in any event, I am entitled to that paper now.

I press my demand, first, that the paper be identified in order that, if necessary, it be called to the Court's attention and, second, in order that I may obtain it.

May I ask: Is there any reason why it shouldn't be identified?

Mr. Monroe: It's a confidential communication and, if the Court orders us to produce it, we will produce it.

Mr. Fortas: You mean that it's privileged? Is that your position? I certainly don't want to ask for anything that's covered by any attorney-client privilege.

Mr. Monroe: It's not covered by the attorney-client privilege.

[fol. 55] Mr. Fortas: Thank you. Then I press my demand.

Mr. Monroe: We are going to respectfully decline to identify it. If the Judge tells us to, we will.

Mr. Fortas: I now ask that the Government counsel state their position with respect to the witness whom they have called in connection with this document.

Mr. Toohey: Our position is, with respect to the paper referrred to by Mr. Fortas, that it need not be identified nor produced at this time.

Mr. Fortas: Now I want the record to show my demand made at this time, that the paper referred to be kept available during the course of this matter so that the Court may rule upon it. And, if you want to, it will be convenient for you to identify it, put a number on it or do something else to make clear the paper to which I am referring, it might be convenient for all concerned.

I may say for the record that, as Mr. Mosman looked at the paper, it appeared to me, sitting across the table from

him, to be a carbon copy of a letter consisting of several [fol. 56] pages. Beyond that I am in no position, I regret to say, to identify it for this record.

Mr. Monroe: Why don't we give it a number? Put a letter on it.

(Thereupon, the court reporter placed the letter "A" and his initials, "R. I. C." on a paper.)

Mr. Fortas: Thank you, sir. The record shows that has been identified by the letter "A" and the reporter's initials.

The Reporter: Right.

Mr. Fortas: Thank you.

Q. Mr. Mosman, can you state approximately the volume of sales done by Herring-Hall-Marvin for the year 1958 in the product drive-in banking windows?

A. No.

Q. Can you state the volume of business done in units or numbers by your company for the year 1958?

Mr. Fortas: You are talking about calendar or fiscal? Excuse me.

Mr. Toohey: For the calendar year.

A. Mr. Toohey, I do not have the figures broken down by product categories and I have no figures available for calendar years. We run our business on a fiscal year basis, and the only figures that I could give you would be fiscal [fol. 57] year and——

Mr. Monroe: Excuse me. Go ahead.

The Witness: Go ahead.

Q. Had you finished your answer, Mr. Mosman?

A. I only wanted to add that the figures were available that you have asked for, but I don't have them.

Q. May I ask, Mr. Mosman, in what form these figures are? In form that is, are they contained in company reports of some kind or another?

A. Yes.

Q. They are available?

A. Yes, in our accounting department.

Q. In your accounting department?

A. Yes.

Q. Are these figures for these individual products listed on separate pieces of paper, that is a separate piece of paper for each product?

A. I would more reasonably say that they were listed for each product for each month.

Q. On separate pieces of paper?

A. In other words, twelve would constitute a year.

Q. Are these bound in a book?

A. I suppose they are.

Q. How *are they described*? Is there a title?

[fol. 58] A. "Shipments."

Q. "Shipments." Is there any more than that?

A. I wouldn't think so. It tells the story pretty well.

Q. How many volumes are there?

A. Categories?

Q. No. How many volumes of——

A. Oh.

Q. —these pieces of paper showing value and units?

A. I couldn't say, but it isn't voluminous. Put it that way.

Q. Mr. Mosman, are your products sold by employees of your company?

A. Yes.

Q. Do these employees contact the ultimate user?

A. Yes, in most cases.

Q. Will you describe your system of distribution for the products you have heretofore described?

A. You mean the complete line of products or just the bank counters?

Q. Well, let's start with the bank unit.

A. Then what was your question again, sir?

Q. Will you describe your system of distribution of these products?

[fol. 59] A. Yes, all right.

Q. And, of course, include to whom they are sold.

Mr. Fortas: Pardon. What was the end of that question?

Q. I will withdraw that previous question and ask you this, Mr. Mosman:

You have described certain products which you have

stated are sold to banks. Will you describe your system of distribution with respect to those products?

A. We manufacture, as I said before, and sell a line of bank vault equipment. We employ people who have been trained over a long period of time to sell this equipment. This equipment is sold through architects or general contractors or, in many cases, directly to the bank.

We have about twelve offices across the nation. With the exception of the States of Washington, Oregon, California, Nevada and Arizona, these twelve offices about which I spoke are our direct factory branch or district offices.

Our sales people are located in those offices. They are highly paid, skilled, engineer-type salesmen, salaried people.

Q. Are you through, Mr. Mosman?

A. The states which I set out as the exception are serviced by a distributor who, in turn, employs the same type [fols. 60-61] of sales people and, generally speaking, sells to the same category of customers.

Q. Will you describe, Mr. Mosman, your system of distribution for products other than those you have just referred to?

A. The system in connection with the sale of fire resistive safes, money safes, insulated vault doors is, these products are distributed mainly through office equipment dealers. We employ a staff of highly paid, engineer-type salesmen who call upon these dealers.

Q. Does that conclude your answer, Mr. Mosman?

A. What?

Q. Does that conclude your answer?

A. There is one more category of business, and that is the United States Government. We also employ salaried people there to sell our products in that field.

Mr. Fortas: Mr. Toohey, would you forgive me? May I ask if the reporter will go back to the beginning of Mr. Mosman's next-to-the-last answer, where he was listing fire resistive files and so on? I am sorry to say I didn't get that category.

(Record read by the reporter.)

Mr. Fortas: Thank you very much.

Q. Mr. Mosman, I had asked you to describe your system [fol. 62] of distribution with respect to products other than bank vault equipment, et cetera; and you had begun to describe your system of distribution for products, including fire resistive safes, money safes, insulated vault doors, et cetera. Have you concluded your answer to that question?

A. I can best say that all the products we manufacture are sold by one group of salesmen or the other.

Q. Mr. Mosman, are the products made and sold by Herring-Hall-Marvin sold throughout the United States?

A. Yes.

Q. You described your system of distribution in connection with bank vault doors as encompassing twelve direct factory or branch offices.

Mr. Fortas: No. Objection.

Q. Is that correct?

Mr. Fortas: Objection to your statement as to what the witness testified as to. I think his testimony was generally with respect to bank equipment. I believe the record will so show.

Q. I would like to ask you, Mr. Mosman, with reference to those twelve offices, can you describe the organization of the office?

A. In New York and Chicago we have ground floor locations where we display many of our products. We have [fol. 63] drafting facilities available, a staff of service people for the maintenance of our customers' products and considerable clerical help. The same thing is true in Chicago.

Q. Is there someone in charge?

A. A manager in each one of these.

Q. There is a manager in charge of each?

A. Of each one of the branches, yes; branches and district offices.

Q. Can you describe the duties of this manager?

A. The manager of a branch or district office is charged with the responsibility of securing the volume—securing or exceeding the volume of business indicated by his quota. He is also charged with the responsibility of spending

whatever money is necessary to accomplish that quota and to try to live within his budget; and he is the general manager of that territory.

We have geographical territories in that branch, and that branch or district office works within the framework of that geographical setup.

Q. May I ask, Mr. Mosman, will you describe the form and general contents of the manager's contacts with the home office?

A. Well, the manager's contact with the home office and [fol. 64] the superior at the home office for whom he works is constant; by telephone, telegraph, correspondence.

In all of the branches or district offices, the contact of those people is also in connection with our treasury department because of checks flowing back and forth. It's also in contact with the shipping department, the factory department, the engineering department, for details of the work that has been sold. In other words, it's an intercourse, continuous intercourse of correspondence.

Q. May I ask, Mr. Mosman, how often a manager is required to report on his responsibilities and how he has carried them out?

A. I would say constantly, four or five times a day in many cases.

Q. Mr. Mosman, I believe you described the organization of any one of these twelve offices as including a staff of service people. Am I correct?

Mr. Fortas: Objection. I believe the record will show that Mr. Mosman was describing his offices in Chicago and New York. If I am wrong about that, the witness, of course, will so state.

Q. I withdraw that question, Mr. Mosman.

Do the twelve offices you have described provide service for and install any of your company's products?

[fol. 65] A. The service work which we do in the field is, generally speaking, located in New York and Chicago. We do have some service work in the New England and Boston area.

There are two sides to your question. The second side is the erection work; is that—installation, I think you called it?

Q. That is correct, Mr. Mosman.

A. That is all done from Hamilton—directed from Hamilton.

Q. May I ask what you mean by "directed"?

A. Well, Hamilton knows when the products are being shipped and they arrange to have an installation supervisor or superintendent there, and the people in the field are employed and the work is done under the supervision of a Hamilton supervisor.

Q. Does the service provided by your company in connection with its products extend only to the period of installation?

A. Oh, no. We do maintenance work on bank vault equipment on a yearly basis, contract basis.

(Thereupon, a short recess was taken.)

Q. Mr. Mosman, does Herring-Hall-Marvin advertise its products?

A. Nationally.

[fol. 66] Q. It advertises them nationally?

A. (Nodding.)

Q. Will you describe how the products are advertised?

A. We advertise our products in appropriate national trade magazines and by direct mail.

Q. Will you identify some of the publications?

A. Burrough's Clearing House, American Banker, Savings and Loan News, Sweet's Catalogue, Office Appliances and Geyers.

Now, those are the main national publications. We do use some sectional magazines.

Q. Will you identify several of the sectional magazines?

A. Well, Southern Banker—I could identify it better by saying that we do not carry on continuous advertising with any sectional magazine; but when we have a convention in a certain area, we put an ad in the publication that serves that area.

Q. Do you advertise at the conventions?

A. Oh, yes.

Q. What kind of conventions are these?

A. The American Bankers Association convention, the Savings and Loan Association convention, the National [fol. 67] Stationers Association——

Mr. Fortas: National what?

The Witness: Stationers.

A. (Continued.) —and the National Association of Bank Auditors and Comptrollers.

Q. Do you attend these conventions personally, Mr. Mosman?

A. Usually.

Q. Usually?

A. (Nodding.)

Q. Has this been your practice since you have been president of Herring-Hall-Marvin?

A. Yes, it has.

Q. How many conventions a year, approximately, Mr. Mosman, do you attend?

A. Four. Those four.

Q. Have you observed at these conventions advertising displays of other companies?

A. Oh, yes.

Q. Do you display your own products at these conventions?

A. Oh, yes. Yes.

Q. Will you describe the nature of the display at a typical convention?

[fol. 68] A. Well, the conventions that you have listed there, which are the four national conventions affecting our business, three of them are bank and savings and loan conventions. Obviously the ABA and NABAC are both banks. Savings and loan is another category of the financial institutions; and the one remaining, the National Stationers, is the convention where we see the dealers, the bank—the office equipment dealers.

Mr. Fortas: You mean office equipment or bank dealers? Excuse me.

The Witness: No. Office equipment. I did mention the word "bank," but I corrected myself.

Mr. Fortas: Thank you.

Q. Can you describe or can you tell us the names of other companies who display their products at these conventions?

A. How narrow or how wide do you want the description?

Q. I would like to ask that question with reference to these products: Bank vault doors.

A. Nobody displays a door. It's a little rough. They weigh about four tons, five tons.

Q. Drive-in banking windows?

A. Yes, we have them at the show.

[fol. 69] Q. My question, Mr. Mosman, was: Can you tell me the names of other companies displaying these products at these conventions?

A. There are only two, Diebold, Mosler and ourselves.

Q. You have personally observed the advertising displays of Diebold and Mosler at these conventions you attend each year?

A. Not this year. They haven't started yet.

Q. Each year?

A. Last year. The '59 conventions will start next month.

Q. Is your answer to my question "Yes," Mr. Mosman?

A. Yes.

Q. You are familiar with the publications in which you advertise your products, are you not, Mr. Mosman?

A. Yes, quite so.

Q. Have you observed in any or all of these publications advertisements by Diebold and Mosler?

A. Uh-huh. Yes.

Q. Have you observed at the conventions displays of night and lobby depositories of Diebold and Mosler?

A. Yes.

[fol. 70] Q. I would like to ask you that same question with reference to safety deposit boxes.

A. Seldom.

Q. With reference to bank vault—I withdraw that. Vault doors?

A. Can't display them; too big. Pictures, yes.

Q. Mr. Mosman, can you state what companies advertise at these conventions the product of bank vault doors?

A. All three of us.

Q. Will you name them?

A. Diebold, Mosler, Herring-Hall.

Q. Are there any other companies which display or advertise this product at these conventions?

A. I never saw anyone else.

Q. Have you observed in the publications——

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TRADE MARK ®

MATTHEW BENDER & COMPANY

-61

microcard

PC173

A. I would like to go back to that answer.

Q. Yes, you may.

A. To the best of my knowledge and belief, I never saw anyone else at the shows. Now, there might be something I have overlooked, but I don't remember.

Q. Have you observed in the national trade magazines, including Burrough's magazine, American Banker, Savings and Loan News, Sweet's catalogue, Office Appliances and Geyers, the advertisement of bank vault doors by companies [fol. 71] other than Diebold, Mosler and Herring-Hall-Marvin?

A. Yes. Sporadically Chubb of England has an ad in one of those papers.

Q. Mr. Mosman, how long have you been associated with the business of the manufacture and sale of bank vault doors?

A. Well, I think I will have to answer that—I don't think I can answer that a specific number of years.

Q. Approximately will be satisfactory.

A. I have been in this business 40 years. I have been associated with Herring-Hall-Marvin 15 of those years.

Q. With whom were you associated prior to the past 15 years?

A. Diebold.

Q. Will you describe your capacity, your position held with Diebold?

A. Well, I started in Cleveland as a salesman and I became manager of that store, office, whatever you want to call it. I was manager of part of their business in New York. I was manager of their Washington branch for a great many years; and at different times during my career with them I was in charge of some of the sales department activities at the home office.

Q. Can you state, Mr. Mosman, what products are made [fol. 72] by Diebold, Incorporated?

A. Diebold makes a wide array of products, many more products—They make many more products now than they did at the time I was there.

When I worked for Herring—for Diebold, we sold bank vault equipment, safes and we were just getting into the record-keeping phase of the business, which has been expanded greatly in recent years.

Q. Were you a stockholder during your association with Diebold?

A. Well now, I had at one time a few shares, and I am confident I did not when I was there. I bought that since I left there.

Q. Did you, while you were associated with Diebold, engage personally in the sale of bank vault doors?

A. Oh, yes.

Q. Did you supervise installation of bank vault doors?

A. No. I supervised people who sold them. At the time I was with Diebold I sold everything that they manufactured at some time or another.

Q. Mr. Mosman, do you consider that Herring-Hall-Marvin is in competition with Diebold and Mosler in the sale of bank vault equipment?

[fol. 73] Mr. Fortas: Well, I am going to object to that question as phrased because, as the witness' testimony heretofore has indicated, the phrase "bank vault equipment" includes a great number of items. I will not object to the question if it is phrased in specific terms.

Q. You can answer the question, Mr. Mosman. His objection has been noted.

A. Let me have your question again.

Mr. Monroe: Why don't you have him read it?

Mr. Toohey: Yes. Would you read that, Mr. Crawford?

(Pending question read by the reporter.)

Mr. Fortas: I renew my objection to the form and substance of the question and respectfully submit that it cannot be answered unless the term "bank vault equipment" is made specific and the items included in the question are specifically identified.

Mr. Williams: You may answer.

Mr. Toohey: You may answer that question, Mr. Mosman.

A. Constantly.

Q. Will you describe, Mr. Mosman, the products included in the category "bank vault equipment" with reference [fol. 74] to your previous answer?

A. What I said previously in the beginning of this conversation——

Mr. Fortas: Well now, excuse me just a moment, Mr. Witness. As I understand the question—I am not sure that I do—counsel is now asking the witness to identify specifically the products under the heading, whatever it means, "bank vault equipment," as to which Herring-Hall-Marvin and Diebold are in competition.

Am I correct in that, Mr. Toohey?

Mr. Toohey: I will have to ask you to repeat that, Mr. Fortas. I am sorry.

Mr. Fortas: Mr. Reporter.

(Record read by the reporter.)

Mr. Toohey: Yes, that is correct, Mr. Fortas.

The Witness: Now, your question to me is the items that make up, in our mind, the bank vault equipment?

Mr. Toohey: That is correct.

Mr. Fortas: No. No. No. Excuse me. As I understand the question, it is: What are the specific items that might be considered under the general category of "bank vault [fol. 75] equipment" as to which Diebold and Herring-Hall-Marvin are in competition? Isn't that correct?

Mr. Williams: That's correct.

Mr. Toohey: That's correct, Mr. Fortas.

Mr. Fortas: Do you understand that, Mr. Witness, if you will forgive me, Mr. Witness?

The Witness: I think I understand it better now than I did before.

Mr. Fortas: I beg your pardon then. Thank you.

A. There can't be a vault without a door. So the bank vault doors, linings, security and collateral chests, trust department chests, safe deposit boxes, night depositories, drive-in windows——

Mr. Monroe: You have got them.

Q. Mr. Mosman, will you describe other products manufactured and sold by Herring-Hall-Marvin in competition with Diebold and Mosler?

Mr. Fortas: I beg your pardon. I didn't hear the end of that question.

Q. We will limit that question to Diebold, Mr. Mosman. Will you describe—And I repeat the question. Will you describe other products manufactured and sold by Herring-Hall-Marvin in competition with Diebold?

[fol. 76] A. The fire resistive line, which is included in our—which includes, rather—all of the items which we consider in that category are—fire resistive safes of all sizes, from 13 inches high and 10 inches wide inside to 66 inches high and 33 inches wide in all grades and types, such as single door and double door; money safes, in all sizes and types; fire resistive vault doors in all sizes and grades.

Q. Does that conclude your answer, Mr. Mosman?

A. Yes.

Q. Do you know of any other products manufactured and sold by your company in competition with Diebold?

A. Well, there are miscellaneous items that I have not mentioned. They are small items as far as we are concerned.

Q. Will you describe, Mr. Mosman, the products included in bank vault equipment? I withdraw that question.

Mr. Mosman, will you describe products which you have described as fire resistive manufactured and sold by Herring-Hall-Marvin in competition with Mosler?

A. May I make it brief? The same items.

Q. These are the same items you described with reference to competition between Herring-Hall-Marvin and Diebold?

A. Yes.

[fol. 77] Q. Is that correct, Mr. Mosman?

A. That's right.

Q. Mr. Mosman, will you describe any products which you do not manufacture, which your company does not manufacture, and which Diebold does manufacture, but which you sell in competition with Diebold?

Mr. Fortas: Wait a minute. Could I have that read back?

(Last question read by the reporter.)

Mr. Fortas: The witness testified that they didn't sell anything that they didn't manufacture. I object to the form of the question.

Mr. Toohey: I will withdraw that question.

Q. Mr. Mosman, will you describe the products purchased by Herring-Hall-Marvin?

(Plaintiff's counsel confer.)

By Mr. Williams:

Q. Mr. Mosman, do you purchase products that you utilize in the manufacture of your end products that to your knowledge Diebold manufactures for itself? Do you understand the question?

A. (Nodding.) I couldn't tell you because I don't know what they manufacture in the way of their components.

Q. Let me ask you this question——

[fol. 78] A. That is the components that we would have to buy.

Q. Do you purchase combination locks from outside suppliers?

A. Yes. Yes.

Q. Do you use those locks in the manufacture of your end product?

A. Oh, yes.

Q. To your knowledge does Diebold purchase those type of locks or do they make them themselves?

A. They make those themselves, I believe.

Q. What is the approximate volume, annual volume, of purchases of combination locks by your company?

A. I can't tell you. I can get the record for you, but I can't tell you.

Q. You have those figures available?

A. Uh-huh.

Q. Mr. Mosman, do you have any patents on any of the equipment you manufacture?

A. Yes.

Q. What.

A. That would be hard to say too. I would have to consult the patent file, but we have many patents.

Q. Do you have any patents on the doors, the vault [fol. 79] doors that you manufacture?

A. Well, we manufacture a door which can be built with an automatic opening and closing process. We manufacture the door and it's priced manually. We have a patent on an apparatus that we can put on the door which will

automatically open the door or close it after the combination lock has been operated, properly operated.

Q. To your knowledge does Diebold have a similar type of apparatus?

A. Nobody does.

Q. Do you consider that an important innovation in your business?

A. Yes. It's really good.

Q. Mr. Mosman, to your knowledge does Diebold and Mosler manufacture and distribute throughout the United States what you have described as bank vault equipment in competition with your company?

A. Oh, yes.

Q. Have you ever seen any of the bank vault doors—I believe you identified a company by the name of Chubb. Is that correct?

A. Uh-huh.

Q. I will rephrase the question. Has the British company Chubb submitted bids in competition with you in the [fol. 80] sale of bank vault doors?

A. In a few instances.

Q. How many instances in comparison with the number of instances in which Diebold and Mosler have submitted bids in competition with you for bank vault doors?

Mr. Fortas: I will object to the form of the question.

Mr. Williams: You may answer.

A. Well, I think that I have knowledge, personal knowledge, of two cases where Chubb submitted a bid. In one case, if my memory serves me right, they were successful. In the other case, they were not.

Q. Is it a fair statement that Chubb very rarely submits bids in comparison with the number of bids submitted by Diebold and Mosler in competition with you in the sale of bank vault doors?

Mr. Fortas: Object to the form of the question.

Mr. Williams: You may answer.

A. Well, Mr. Williams, the perimeter of the sale is out here (indicating), and I am sitting on the inside here; so it's conceivable that there are a lot of things go on that I don't know about.

But the information that gets to me is that we very rarely hear from Chubb. The second thing, they don't [fol. 81] build equipment, comparable equipment, to any one of the three of us.

Q. Do you consider the British company a competitor of any importance?

A. Well, their design is not acceptable to the American market. At least it has never been up until now.

Q. Would you answer specifically my question, please?

Mr. Williams: Would you repeat the question, Mr. Reporter?

(Pending question read by the reporter.)

A. No.

Q. Mr. Mosman, to your knowledge have any companies entered the business of manufacturing and selling what you have described as bank vault equipment in recent years?

Mr. Fortas: I object to the form of the question as being a compound question.

Mr. Williams: You may answer.

A. No. No.

Q. Have companies who have engaged in the business of manufacturing and selling what you have described as bank vault equipment passed from the scene in recent years? By that I mean through merger, acquisition or going out of business.

[fol. 82] A. Some.

Q. Could you identify some of those companies?

A. Remington and Sherman, Philadelphia——

Q. Could you state approximately when that occurred?

A. Right after—Right before the first—the second world war.

Q. Would you proceed?

A. The Hall's Safe Company, about 1950——

Q. Excuse my interruption. But did these companies you have identified, were they merged with other companies or did they just go out of business?

A. They were practically out of business and, as far as we are concerned, we bought both of them. We bought their name principally.

Q. Would you continue with your answer?

A. The only other case that I remember is the York Safe and Lock Company at York, Pennsylvania.

Q. What happened to that company?

A. Diebold bought it.

Q. Do you know approximately when?

A. No. I would have to guess. I would say '47.

Q. Have you sold any companies or subsidiaries of your company to any other company engaged in the manufacture [fol. 83] of what you have described as bank vault equipment in recent years?

A. I sold the Herring-Hall-Marvin Safe Company of Canada last year, last year about this time, to Diebold.

Q. Did that company manufacture and sell what you have described as bank vault equipment in the United States prior to its sale?

A. Not all of the items, but they made doors and lockers and——

Mr. Fortas: Move to strike. The answer is not responsive to the question. The question is——

Did they sell in the United States?

The Witness: He didn't say that.

Mr. Fortas: Yes, sir; he did.

Mr. Williams: Yes.

The Witness: Did he? It didn't sound like it. I missed the point of your question. Excuse me.

Q. It's all right. How much did you get for that company, Mr. Mosman?

Mr. Fortas: Well, I am going to object to this. It certainly is not relevant to any discovery with respect to the instant case.

Mr. Williams: You may answer.

A. Around $200,000, Canadian dollars.

[fol. 84] Q. Do you know whether or not Diebold sold—— Excuse me. Let me ask you this question:

Where, in what countries did your subsidiary in Canada distribute its products?

A. Canada.

Q. Do you know whether or not Diebold sold bank vault equipment in Canada prior to the sale of your company?

A. Diebold sold most of its goods in Montreal through a dealer in Montreal.

Q. Did Diebold——

Mr. Fortas: Wait a minute. Move to strike unless the witness knows whether the sales were made in the United States or in Canada.

Mr. Williams: I was going to ask a question to this effect:

Q. Do you know whether or not Diebold manufactured equipment in the United States and shipped it into Canada for distribution?

A. This would have to be to the best of my knowledge and belief. They did.

Q. Did they ever tell you they did?

A. No, I don't think they did.

Mr. Fortas: I want the record to show that I object to and [fol. 85] will continue to object to any inquiry into this Canadian situation as totally outside the scope of the complaint, totally beyond any appropriate discovery in this case.

Mr. Williams: At this time—Off the record.

(Discussion off the record.)

(Thereupon, at 12:40 o'clock P.M., the taking of the within deposition was recessed until 1:45 o'clock P.M., this same date.)

[fol. 86] Afternoon Session—Saturday, August 29, 1959
1:45 o'clock P.M.

(All counsel being present as heretofore noted, the taking of the deposition continued as follows:)

WARREN MOSMAN, was examined and testified further as follows:

Direct examination (Continued.)

By Mr. Toohey:

Q. Mr. Mosman, you have made a distinction between bank vault equipment and fire resistive equipment?

A. (Nodding.)

Q. Will you explain the reason for that?

A. Well, the bank vault equipment is principally a solid steel product and a product which is strictly adapted to financial institutions.

It is principally a product to resist burglarious attack; and its construction differs from the fire resistive in that the fire resistive products are manufactured for the protection of records against fire. They are not solid steel. They are steel with a compound between the steel walls to supply the fire protection for the records.

Q. To whom does your company sell fire resistive equipment?

A. We sell a small amount to retail customers. Princi- [fol. 87] pally we sell to customers who are the customers of our office equipment dealers.

Q. What kind of companies purchase fire resistive equipment?

A. Everybody.

Q. Mr. Mosman, do you know of any special reason why there have been no new companies in the business of manufacturing and selling bank vault equipment and fire resistive equipment in recent years?

Mr. Fortas: Oh, no. Objection. There is nothing in the record to support that question.

Q. Rephrase that question. Mr. Mosman, do you know of any special reason why there has been no new companies coming into the field of the manufacture and sale of bank vault equipment in recent years?

Mr. Fortas: I object to that one too on the basis of this record, as I recall it, without having the transcript before me. I believe that the testimony on this subject was confined to the subject of bank vault doors; and the witness,

I am sure, will correct me if I am wrong, but that's my recollection of the testimony.

Q. You can answer the question, Mr. Mosman.

A. You want me to answer your question?

[fol. 88] Q. Yes.

A. And your question, if I remember it correctly, is that you want to know why there have been no new companies who have set up to manufacture and sell bank vault equipment?

Q. That's correct.

A. I would say that there are two or three factors: One—and I think this is the principal one—to successfully sell bank vault equipment, the manufacturer must have a reputation; the reputation of long-standing in the field, the reputation that they would be prepared to not only manufacture and distribute and install the work, but also to maintain it. And no one knows how long any company is going to be in business, but the companies that are in business have been there a long while and it's reasonable to suppose that they could maintain the equipment over the years.

Second, it takes a pretty good investment to get into this business; and, third, not everyone can build the kind of equipment we build. There are techniques over the years that we have learned, and I would say that that is the third deterrent to newcomers in the field.

Q. Mr. Mosman, what special significance is there to the fact of being a well-established company in the field?

A. What is the significance?

Q. Yes, what is the significance?

[fol. 89] A. Well, I think that has many sides to it. One, the customer will not—the customer prospect will not buy from Joe Blow, if I can use that sort of an expression; and, second, the insurance companies—and, after all, all financial institutions carry some sort of insurance; and the insurance companies insure the products built by Herring-Hall-Marvin without question, millions of dollars on our equipment.

Q. Mr. Mosman, do you consider your company, Herring-Hall-Marvin, to be a substantial competitor in the field of bank vault equipment?

Mr. Fortas: Objection to the form of the question.

Mr. Williams: You may answer.

Mr. Toohey: You may answer the question, Mr. Mosman.

A. I don't know particularly what you mean, Mr. Toohey, by "substantial." But if you mean that we are equal competitively to anyone in the field, I would say yes.

Q. Mr. Mosman, in your opinion, how does your company rank in comparison to Diebold and Mosler in the manufacture and sale of bank vault equipment?

Mr. Fortas: Objection to the form of the question.

A. Volumewise?

[fol. 90] Mr. Fortas: Excuse me, Mr. Witness. I objected to the form of the question.

Mr. Toohey: Go ahead.

The Witness: Go ahead?

Mr. Toohey: (Nodding.)

A. We are the smallest. Is that what you meant? Size?

Q. Yes. Mr. Mosman, can you give me your—Your answer was in effect that you are the smallest company in relation to Mosler and Diebold?

A. That's right.

Q. Can you state, Mr. Mosman, how Diebold ranks in comparison to Mosler and Herring-Hall-Marvin?

Mr. Fortas: Well, I object to this. This witness is not qualified to answer this.

Mr. Williams: Go ahead.

Mr. Toohey: You may answer the question, Mr. Mosman.

A. I would have to qualify any answer that I gave you to that question in this fashion, that all I know is what I am able to observe or what has been told me; and I would say that Mosler and Diebold are about the same size in the area of business that is competitive to ours; and I would say that they are, both of them, 80 to a hundred percent bigger than we are.

[fol. 91] Q. Mr. Mosman, can you state what percentage of bank vault business done in the United States is done by Herring-Hall-Marvin?

A. Again I would have to guess. Again I would have to guess.

Mr. Fortas: May it be understood that when you say "bank vault business" you are referring to the products heretofore enumerated on this record?

Mr. Williams: That's right.

Mr. Toohey: Yes.

Mr. Fortas: And just so we will all be clear, because that's a very confusing term, that you were using that term—and I don't concede the correctness of it. As a matter of fact, I think it is not correctly used.

But, as I understand your questions, you are using the term to include doors, linings, security and collateral chests, trust department chests, safe deposit boxes, night depositories and drive-in windows. Is that the sense in which the question is asked? That is the list heretofore stated——

Mr. Toohey: That is correct.

Mr. Fortas: —by the witness in connection with the definition of "bank vault equipment."

[fol. 92] Mr. Williams: That's true.

Mr. Fortas: I want to be clear on what we are talking about.

Mr. Monroe: That isn't, I don't believe, quite correct.

Mr. Fortas: I beg your pardon. I thought I had covered it correctly.

Mr. Monroe: On the first list he gave you, he had miscellaneous bank vault items.

Mr. Williams: That's in addition to the specific product?

Mr. Fortas: You mean the list that I gave plus miscellaneous bank vault products?

Mr. Monroe: Yes.

Mr. Toohey: Bank vault equipment?

Mr. Monroe: My recollection of the comment by Mr. Mosman was that it was "miscellaneous bank vault items."

Mr. Fortas: My notes show that the first time he referred to that term he did mention "miscellaneous bank vault items"; but the second time, which was the first time that he specifically listed them according to my notes, he did not mention "bank vault items."

[fol. 93] I am sorry to engage in all this, but I think we

will just have a confused record unless we are all talking about the same thing.

Mr. Toohey: May we understand then that by the term "bank vault equipment" the products enumerated as follows, vault doors, linings, security and collateral chests, trust department chests, safe deposit boxes, night depositories, drive-in windows and miscellaneous bank vault items, are included?

Mr. Fortas: Subject to my objection that that is completely erroneous and unjustified use of that phrase.

Q. Mr. Mosman, have you had any discussion with officials of Diebold concerning the disposition to be made of the assets and properties of Herring-Hall-Marvin after the acquisition has been consummated?

Mr. Monroe: Excuse me a moment. I would like for you to read that question back.

Mr. Williams: The question posed had not been answered, Mr. Mosman.

The Witness: I think so.

(Last question read by the reporter.)

The Witness: I think there is one before.

The Reporter: "Mr. Mosman, can you state what per-
[fol. 94] centage of bank vault business done in the United States is done by Herring-Hall-Marvin?"

A. And I think I said—If I didn't, I will say it now—that it will be very difficult for me to answer because I don't have the figures of the competitors.

Mr. Fortas: I want to object to his going on.

Q. The objection has been noted. Go on, Mr. Mosman.

A. If I had to say anything——

Mr. Fortas: You don't have to say anything. And I object to surmise and speculation in a situation where figures can be made available, and I want my objection clear on this record, and I respectfully request Government counsel to consider seriously whether my objection is well taken.

Mr. Williams: I would like to say this for the record, that these questions are asked to the witness. He has pre-

viously testified as to his knowledge and experience in the industry, and these questions are directed to his best estimate as to the relative position of the various companies.

I would like for you to answer that question, Mr. Mosman.

Mr. Fortas: And I should like to note, in view of the [fol. 95] statement that Mr. Williams has made, that the witness has testified that he hasn't the facts with him: as to his own business, that those facts are available, and that he does not know the facts and figures as to the business of his competitors.

In the situation, I submit and will maintain, that surmise, speculation and estimates have no place in this serious record.

Mr. Williams: Would you give an estimate Mr. Mosman?

A. Twenty percent.

Q. Mr. Mosler—Mosman—Excuse me.

A. I am not Mr. Mosler.

Q. Mr. Mosman, will you give us your estimate of the relative percentage of the bank vault equipment business done in the United States by Diebold?

A. I don't think I could do that, Mr. Toohey.

Q. This question has been asked. I repeat it. Have you had any discussion with any official of Diebold concerning the disposition of the assets and properties of Herring-Hall-Marvin to be made after the merger is consummated?

A. I think we have had some conversations. There certainly has been none finalized.

Q. With whom have you had these conversations?

[fol. 96] A. Mr. Koontz.

Q. Mr Koontz?

A. I have had no conversation with anybody but him.

Q. What was said, Mr. Mosman?

A. Well, there were a great many things said.

Mr. Fortas: I am going to object to the form of this question unless the witness is asked when and where.

Q. Mr. Mosman, will you identify Mr. Koontz?

A. Yes. He is president of Diebold.

Q. When were these conversations held?

A. As I have said before, there has been nothing specific about what we are to do. There has been conversation at one time with Mr. Koontz that we would be——

Mr. Fortas: Objection unless he fixes the time and place.

By Mr. Williams:

Q. Mr. Mosman, let's go to the first conversation that you can recall that you had with Mr. Koontz relative to what disposition would be made of the property and assets of your company in the event that a contract for the sale of such property and assets by your company to Diebold is consummated. When was the first time you had any [fol. 97] conversation with Mr. Koontz along those lines?

Mr. Fortas: Just a moment. Mr. Williams, I am not going to object to your taking over in medias questions. I don't know what the Latin is for "question." I merely want the record to show that that is what is occurring, and I am confident that you will not press me by doing this to an excess.

Q. Will you answer the question?

A. Actually, I am having considerable difficulty in answering your question because I am trying to recall any specific information that I have on this subject.

I had a conversation with Mr. Koontz in—I am not sure whether it was May or June—in New York in his suite at the Barkley Hotel, in which——

By Mr. Toohey:

Q. Excuse me, Mr. Mosman. May I interrupt to ask you the year?

A. Yes. Huh?

Q. What year was that?

A. It was either June or July of this year.

Q. Have you finished, Mr. Mosman?

A. (Nodding.)

Q. May I ask, what was said at this conversation?

A. Well, as I say, we had a general conversation about [fol. 98] the companies, both the companies. To tell you that he specificially and definitely told me exactly how he was going to handle the thing, I couldn't do it because he

didn't. There had been conversation that he would make this a corporation.

Q. Is this conversation you now refer to in May or June of 1959 at the Barkley Hotel?

A. I am not sure that it was then, but I think it was. And then the question came up about making it a division of Diebold.

Q. Did Mr. Koontz raise that question?

A. I raised none, none of the questions. He did.

Q. What did he say?

A. I couldn't repeat his conversation.

Q. What was the substance of his conversation, Mr. Mosman?

Mr. Fortas: Well, you have just asked that.

Mr. Toohey: I asked Mr. Mosman what Mr. Koontz said. I now ask him what the substance of the conversation was.

A. Well, in a situation of this kind, a couple of companies, there are many things to discuss; and our conversation was rambling, I would say. It was not specific. It was rambling.

[fol. 99] He naturally had telephone calls and interruptions. Certainly there was nothing specific—There was nothing specific came out of that conversation with him. I can say that.

Q. Did you ask Mr. Koontz whether Herring-Hall-Marvin would be made a division?

A. No, I did not.

Q. Did Mr. Koontz tell you it would be made a division?

A. Mr. Koontz said at one time—I have no reason to believe it was not at that time—that he had planned to incorporate Herring-Hall-Marvin Safe Company, using the name; and then, at second thought, he seemed to think he would make it a division.

Q. He told you this at this meeting in May or June 1959 at the Barkley Hotel?

A. Yes.

Q. Did he say anything else with relation to the future disposition of Herring-Hall-Marvin at this conversation held in May or June of 1959 at the Barkley Hotel in New York?

A. The disposition?

Q. Yes.

A. No, not that I know of. (Examining calendar.)

[fol. 100] What I am trying to do is to establish when that conversation could have been, and it must have been in June. It would be in June, and it should be about the 9th of June.

Q. Is that the only conversation you have had with Mr. Koontz relative to Mr.——

A. I believe it is, yes. It must have been the 9th of June.

Q. Mr. Mosman, did you and Mr. Koontz discuss disposition of the plant in Ohio, Hamilton, Ohio?

A. What do we mean by the word "disposition"?

Q. What is going to be done or what might be done with that plant, physical plant, after the consummation of the merger?

A. Oh. Well, we excel in certain items and, unquestionably, they do in other items.

Mr. Fortas: Just a moment. The question is: Did you discuss with Mr. Koontz what was to happen with the plant in Hamilton? Is that right? Are you now relating the discussion?

The Witness: I can't answer the question—I can answer it, yes, if you want that.

Q. I would like you to answer the question, Mr. Mosman.

A. Yes. We did discuss it.

[fol. 101] Q. You did discuss it?

A. Yes.

Q. What was said?

A. As I started to say a moment ago, our plant excels in certain things and theirs in others; and there would be some idea that they would take those operations in which they excel to Canton and perhaps exchange other operations down to Hamilton.

Q. Was there any discussion concerning the actual movement of production facilities from Hamilton to Canton?

A. Not as such; general. Just as general as I have just made it.

Q. How many employees do you have at the Hamilton plant, Mr. Mosman?

A. We have between 675 and 700 at Hamilton.

Q. Are any of these employees under long-term employment contracts with your company?

A. No.

Q. None?

A. (Shaking head.)

Q. Did you discuss with Mr. Koontz any possibility for arranging for long-term contracts with any of your present employees at the Hamilton, Ohio plant?

A. He said, "No." He said he wouldn't do it.

[fol. 102] Q. Let me see if I understand you, Mr. Mosman. You did discuss this——

A. It came up.

Q. —with Mr. Koontz?

A. It came up.

Q. Did you raise the question?

A. I certainly did.

Q. And his answer was——

A. "No."

Q. —he would not consider any long-term contracts?

A. That's right.

Q. Mr. Mosman, was this discussion we have referred to concerning the employment contracts part of the conversation you had with Mr. Koontz in New York at the Barkley Hotel?

A. No. That conversation took place in Chicago at the Drake Hotel when we first started talking about——

Q. When was that, Mr. Mosman?

A. That would be in May, and I can't give you the date.

Q. May, what year?

A. Of this year.

Q. 1959.

A. May I say something? (Conferring with Mr. Mon-

[fol. 103] roe.)

Q. Mr. Mosman, was that——

Mr. Monroe: Hold it.

The Witness: Excuse me.

Mr. Toohey: Yes.

(Witness confers with Mr. Monroe.)

Q. Mr. Mosman, was that conversation in May in Chicago——

A. Yes.

Q. —concerning the employment contracts the first conversation you had with Mr. Koontz relating to the merger?

A. That was the first conversation I had with Mr. Koontz about this chapter of merger. We had been talking for a great many years back and forth.

Q. When was the first discussion had relative to the possibility of merger between Herring-Hall-Marvin and Diebold?

Mr. Monroe: Can you answer that?

A. I am trying to think. It was a long time ago. September '57.

Q. September '57?

A. (Nodding.)

Q. Mr. Mosman, at any time in the recent past have you considered selling your company to any other purchaser? [fol. 104] A. I have had people who wanted me to sell to them.

Q. Who were they, Mr. Mosman?

A. Well, I had one group in New York headed by Hayden Stone.

Q. Did the Mosler Company ever——

Mr. Fortas: I don't believe the witness finished his answer.

Q. Have you finished, Mr. Mosman?

A. We have not entertained any other arrangement, that is in recent months, than the one that was headed by Hayden Stone.

Q. I asked you whether in recent years, Mr. Mosman, the Mosler Company has sought to purchase Herring-Hall-Marvin?

A. Yes.

Q. When?

A. The same time, 1957.

Q. Do you know approximately when in '57?

A. September.

Q. September. Why didn't you sell to Mosler?

A. Why, I would say that that would be confined to personal reasons.

Q. Mr. Mosman, in connection with Mosler's approach to you to purchase your company and your disinclination

to sell, did you consider the possible effect on competition [fol. 105] of the purchase by Mosler of your company?

A. It was discussed.

Q. Was it possibly discussed in terms of a violation under Section 7 of the Clayton Act?

Mr. Fortas: I am afraid I have got to object to that as calling for a characterization and a legal conclusion.

Q. Did you receive legal advice on whether or not the possible acquisition of Herring-Hall-Marvin by Mosler would violate Section 7 of the Clayton Act?

A. Yes.

Q. Will you state what the nature of that legal advice was, Mr. Mosman?

Mr. Monroe: I am going to object to that.

Q. Mr. Mosman, was the legal opinion given you in connection with the possible purchase by Mosler of Herring-Hall-Marvin a factor in your decision not to sell the company to Mosler?

Mr. Fortas: I object to that.

Mr. Monroe: I object.

Mr. Kramer: Not to sell the company to who? I didn't hear that.

Mr. Williams: To Mosler.

[fol. 106] Mr. Toohey: I think that's for Mr. Mosman to decide.

Mr. Monroe: I am going to object to it.

Q. Mr. Mosman, I have here a document which purports to be an agreement of purchase and sale between Herring-Hall-Marvin Safe Company and Diebold, Incorporated. I ask you to look at it and identify it for me (handing).

A. (Examining.)

Q. This is what, Mr. Mosman?

A. That is the option and the agreement to purchase and sell, I think is the title, which was worked out by the attorneys.

Q. Mr. Mosman, was this document signed?

A. Yes, it was.

Q. By you?

A. It was.

Q. And by the president of Diebold, Incorporated?

A. I don't believe the president, no, but an authorized officer.

Q. An authorized officer?

A. A vice president.

Q. On what date, Mr. Mosman?

A. July 17, 1959.

Q. Is this a true copy of the contract, Mr. Mosman?

[fol. 107] A. I didn't read it, but I presume it is. The first page and the last page looked like it is.

Q. And this document, Mr. Mosman, what is that (handing)?

A. (Examining.) Yes, that was made later.

Q. And this is what, Mr. Mosman? Would you describe this?

A. This is an amendment to that purchase.

Q. This is an amendment to that purchase agreement?

A. Yes.

Q. Was it signed by you, Mr. Mosman?

A. Yes, it was.

Q. Was it signed by an officer of Diebold?

A. An officer. I don't remember who signed it.

Q. And when was it signed?

A. July 17th.

Q. July 17th. Mr. Mosman, would you look further through that to make sure that you can answer the question whether it is a true copy of the contract?

A. I would have to read every word of it and get my lawyer to read it. I think that it's reasonable to assume that it is.

Q. Do you know any reason why it shouldn't be a true [fol. 108] copy?

Mr. Fortas: Now, wait a minute. Will you identify the source of that? What is the source of that paper that was handed the witness?

Mr. Monroe: Let me make a suggestion there. Will there be any problem in stipulating as to what the true agreement is?

Mr. Fortas: I don't know, but I want to know what the source of that document is. Where did the Government get it? If it came from the files of somebody, we can pre-

sume that it is an accurate copy. If it didn't, we may or may not be able to.

Mr. Monroe: I mean there isn't going to be——

Mr. Fortas: I would like to have him answer my question. Excuse me, sir.

By Mr. Williams:

Q. Mr. Mosman, can you state whether or not this is a copy of the contract that was submitted by you to the Department of Justice, after receipt of a letter from the Department of Justice, asking you for certain documents and information——

A. That's right.

Q. —in connection with the proposed merger of your company and Diebold?

[fol. 109] A. That's right.

Mr. Fortas: All right. Thank you, sir.

Now, may we go off the record a minute?

(Discussion off the record.)

Mr. Fortas: In an off-the-record discussion it was agreed among counsel that copies of the following documents would be supplied: Number 1, the option agreement between Diebold and Herring-Hall-Marvin, to which is and was physically attached the contract of purchase and sale; 2, the contract of purchase and sale as executed by the parties in this second document. In the contract of purchase and sale as executed by the parties there appears on page 10 a change which was made pursuant to agreement of Diebold and Herring-Hall-Marvin and the parties. The third document which will be supplied is a one-page document entitled "Amendment to Agreement of Purchase and Sale."

And may I further suggest that, if all counsel are willing, it may be stipulated that photographic copies may be supplied as though the originals. All right?

Mr. Monroe: I think if you are going to make this complete, you have got to have all the documents in one. [fol. 110] There is an employment contract involved in here.

Mr. Williams: We would like to get all the contracts—all the documents that encompass the understanding or

agreement between the parties in connection with the proposed transfer of property and assets, whatever they may be.

Mr. Fortas: You better ask the witness.

Q. Mr. Mosman, are there other written agrements of any kind between Diebold and Herring-Hall-Marvin with respect to the transfer of the assets and properties of Herring-Hall-Marvin to Diebold that have not been identified by Mr. Fortas?

A. I don't believe there are. (Conferring with Mr. Monroe.)

Mr. Fortas: Let's get off the record.

(Discussion off the record.)

Q. Mr. Mosman, is there any written employment agreement between you as an individual and Diebold, Incorporated?

A. That's right.

Mr. Williams: Is it agreed by counsel that when these documents are produced they will be marked as Exhibit 3-A, 3-B and so forth? Is that all right?

Mr. Kramer: Better make it clear now, which is which, [fol. 111] Larry.

Mr. Fortas: Do you want me to try?

Mr. Williams: Yes.

Mr. Fortas: In the off-the-record discussion counsel for the plaintiff inquired about copies of the employment contract. There is an employment contract dated June 16, 1959, which shows that it was executed on July 17, 1959 between Diebold, Incorporated and Warren Mosman. There is also an addendum to the employment contract which was executed on July 17, 1959.

Now, at the suggestion of counsel for the plaintiff, I take it it is agreed that the following documents will be numbered as follows:

The option agreement, to which is attached the agreement of purchase and sale, will be marked as Plaintiff's Exhibit 3 for identification. The separate copy of the agreement of purchase and sale showing the change as executed by the parties will be marked as Plaintiff's Exhibit number 4 for identification.

The amendment to the contract of purchase and sale executed by the parties will be marked Plaintiff's Exhibit [fol. 112] number 5 for identification. The employment contract will be marked Plaintiff's Exhibit number 6 for identification. The addendum to the employment contract will be marked Plaintiff's Exhibit number 7 for identification.

Mr. Williams: (Nodding.) Would you like to cross examine now, Mr. Fortas?

Mr. Fortas: Yes. You have concluded your direct?

Mr. Williams: Yes.

Cross-examination.

By Mr. Fortas:

Q. Mr. Mosman, I am first going to ask your assistance on some technical facts and terms that have been used here so as to help all of us get an understanding of your testimony.

A bank vault is a structure that is physically located in a bank building and is part of that building; is that correct?

A. The concrete part of it, yes.

Q. And the vault itself, except for the doors and whatever may be inside of it and except for the lining, is generally made of concrete or reinforced concrete?

A. Yes.

Q. And is that built on the site?

[fol. 113] A. It's part of the building.

Q. And is Herring-Hall-Marvin engaged in the business of building those concrete structures?

A. No.

Q. And when you talk about—When you used any of the terms that have been used here, you did not intend to include the physical structure of the vault, meaning the walls, ceiling and floor, whatever that may be?

A. The concrete walls, top, back and front are not included in anything that I have spoken of.

Q. Thank you. Now, if a bank—Let us say that a bank goes into a new building or a new bank is opened, they will customarily want a vault, won't they?

A. Usually.

Q. Usually, but not always?

A. That's right.

Q. Some banks operate without vaults; is that correct?

A. That could be.

Q. Now, will the bank usually hire an architect to design its bank building if it's building a new structure?

A. Almost always, yes.

Q. Are there architects who specialize in bank construction?

[fol. 114] A. Oh, yes.

Q. And those are men who design the entire bank structure, including the vault

A. Well, I don't think an architect who would be called in to design a bank building for the First National Bank for whatever town would design everything except the bank vault, and I am talking now about the masonry structure of the vault.

Q. Yes, sir, that's what I am talking about.

A. That's right.

Q. So that that would be included in the architect's drawings and specifications?

A. Yes.

Q. Now, in those drawings and specifications, would the architect also include specifications with respect to the vault door?

A. He might. He might say, "Be selected by the owner."

Q. Now, in connection with the larger banks, is that ordinarily included in the specifications of the architect?

A. Usually.

Q. Those specifications are pretty detailed, are they not?

[fol. 115] A. Uh-huh.

Q. Is your answer "Yes"?

A. Yes.

Q. Thank you. Then the owner or the architect will usually select a contractor; is that right?

A. Either select or they will put the building for public bids and somebody is then awarded a contract.

Q. As the prime contractor?

A. Uh-huh.

Q. And I believe you testified—correct me if I am wrong

—that your orders for vault doors will come from the architect or contractor or the bank itself?

A. That's true.

Q. Now, when your orders come from the architect or the contractor—strike that.

Do you receive specifications as to vault doors from the contractor or the architect or the bank?

A. I don't know that I understand your question.

Q. Do you receive specifications such as how thick the door should be, what its dimensions should be and so on?

A. Well, I would have to—I thought that's what you said, but I wanted to be sure, you know, to answer you properly.

Q. Thank you.

[fol. 116] A. I don't think that I could answer that "Yes" or "No." That's what I am trying to say.

Each project is a project of its own, as to size, construction, details. In some cases we receive a request to furnish prices on a certain type of door that will meet a certain insurance specification; and they will mention in this specification Diebold's number so and so, Mosler's number so and so and Herring-Hall-Marvin's number so and so as acceptable. Any one of the three is acceptable. Now, that is one area where we work.

The next time that we have a job, a project, it may very well be that the bank is particularly sold on one of the doors manufactured by one of the three companies, and he will specify that door absolutely. That's it.

Then the next fellow, he will say that all we have to do is to meet a certain thickness of the door.

And so, as I say, to answer your question "Yes" or "No" is impossible because it doesn't work as easily as that, is what I am trying to say.

Q. Yes, sir. I was interested in your statement that these are individual jobs.

A. Oh, yes.

Q. I have forgotten just how you phrased that.

A. Individual projects.

[fol. 117] Q. I beg your pardon?

A. Individual projects.

Q. Yes, that's what you said. Does that mean that each order is what I would call tailor-made; that is, apart from the fact that you may have certain basic designs and what

not, that each job is an individual project in the sense that it's fabricated for a specific purpose?

A. Well, there is a great deal in what you say. The reason there is so much difference in each one of the projects as they come along, the group buying this thing will probably never buy another bank vault as long as they live. So each one, each project, has the personality of the individual definitely written into the specifications. You can understand how that would be.

Q. Yes.

A. This bank building and its vault and all the apertures and all the accessories are a monument in many cases to some individual. And so the specific statement, "black" or "white," is not applicable.

Q. Yes. The point is, however, that these are purchased by the bank or the contractor, the architect, with the thought in mind that they are going to be there for a long, long time?

A. Too long.

[fol. 118] Q. And they are individually tailored?

A. To a great extent, yes.

Q. Yes. Now, you don't keep a stock on hand of vault doors? In other words, it's not like canned soup, is it, where everybody has an inventory on hand, the customer comes along and selects——

A. Well, Mr. Fortas, it must be remembered that we don't have the same stock as Campbell's Soup, the same stock on our shelves as you would have if you were selling Campbell soup.

But basically all of the doors that we build, or a great many of the doors—most of the doors that we build, perhaps 90 percent, fall within a basic area of thickness.

Q. You mean they are adapted to individual specifications?

A. Now, where the difference in dimensions comes is in the masonry structure. Now, if the masonry structure has a lining, then there is a difference there, but you use the same basic plates. You use the plates that are four feet wide, six feet wide, eight feet wide, whatever they may be, but they are the same basic plates.

To say that we don't have an inventory of standard

doors would not be true. We do have. We do have. [fol. 119] They are in process all the time.

Q. In the sense that you have the basic plates in process?

A. Basic doors in process.

Q. Then they are all adapted to the basic desires of the person ordering them?

A. Yes, that's right. The adaptation, however, is a difference in the masonry size rather than in the size of the door or the thickness of the door.

Q. Yes, right. Now, did you estimate the average selling price of a Herring-Hall-Marvin vault door?

A. I didn't estimate it.

Q. Could you estimate that?

A. Rather than the average, I could tell you the range.

Q. Well, let's start——

A. We start out at about $9,000 and we wind up about 35, for the door.

Q. About 35——

A. Thousand.

Q. —hundred? Thirty-five thousand?

A. Thirty-five thousand.

Q. Now, are you talking about the door only?

A. That's right.

[fol. 120] Q. Now, does that include the insulated vault doors?

A. Oh, that is in another category. That's entirely outside of what I am talking about. I am talking about bank vault doors, Mr. Fortas.

Q. Insulated vault doors are much more in price?

A. Oh, yes.

Q. What do they run, about?

A. Well, the insulated bank vault—the insulated fire resistive doors start out at 600—I don't know—between six and seven hundred.

Q. And there are some banks that do use——

A. Oh, yes.

Q. —an insulated door?

A. Oh, yes, for the records. They have a record vault, certainly. We apply a door to that. That's entirely outside of the bank vault.

Q. Well, however that may be, there are some banks that have vaults with only the insulated doors and not the other kind of door; is that right?

A. Sure.

Q. Mr. Mosman, based on your past experience in this field, isn't it true that for many years prior to World War II, let us say, there were very few new banks that were [fol. 121] being built?

A. Too few.

Q. So that there were very few doors, vault doors, being sold in those years?

A. That is right.

Q. And that in recent years there has been an increase in—there has been a good deal of construction in the bank field?

A. Oh, yes.

Q. And that the sale of vault doors will have more or less of a relationship to the number of new banks being built?

A. Oh, yes.

Mr. Kramer: What was his reply?

Mr. Fortas: He said, "Yes."

The Witness: Yes.

Q. Isn't it true that the number of banks is declining?

A. There may be some figures on that. I don't know.

Q. All right. Your estimate of 300 doors that you sold, those were sales to banks?

A. Financial institutions, banks and savings and loan.

[fol. 122] Q. And lots of savings and loan offices don't use the bank vault doors; is that right?

A. That's right.

Q. There are lots of them that use fire insulated doors?

A. Uh-huh.

Q. Lots of them that have only safes; is that right?

A. Uh-huh.

Q. Are you able to break down that 300 figure?

A. No.

Q. And I think you made it clear in your testimony that that might be high or not exactly correct?

A. It's approximate.

Q. Now, you were testifying about service contracts. And the servicing function that Herring-Hall-Marvin provides, you testified, is on a contract basis; is that right?

A. Some of it is. Of course, there is always the day and day business.

Q. Do you hold yourself out to service any kind of bank vault door, whether it's made by Herring-Hall-Marvin or anybody else?

A. We can, of course.

[fol. 123] Q. And you have contracts to service doors that are not made by you?

A. Yes.

Q. And that's customary in the industry?

A. Throughout the industry.

Q. In other words, Mosler may service a Diebold or a Herring-Hall-Marvin door?

A. (Nodding.)

Q. And you may service a Mosler door; is that correct?

A. That's right.

Q. And isn't it true that there are a great many organizations and individuals throughout the country who service bank vault doors?

A. Well, there is only one of any importance; that's Yale and Towne.

Q. Yale and Towne is a very large company, isn't it?

A. That's right.

Q. And they do service bank vault doors?

A. That's right.

Q. And you say they are very important in that?

A. Tremendously important; that's right.

Q. Would you say they are bigger in that business than [fol. 124] you are, than Herring-Hall-Marvin?

A. Oh, yes.

Q. The question I was asking is, really I had in mind the individual companies and individual persons in cities that hold themselves out to service bank vault doors, in addition to Yale and Towne and the other big companies.

A. There aren't any big companies.

Q. No. But there are individuals and small companies?

A. Oh, yes. Individuals who may have a service business, something like that, have a few accounts.

Q. And there are some banks that use persons and small companies like that for their service work; isn't that right?

A. That's right.

Q. Oh, yes. In your testimony about the installation of bank vault doors, I believe you testified that those installations are under the supervision of people from Hamilton?

A. That's right. I want to correct that.

Q. Yes, sir.

A. I think I said that's handled from Hamilton. In other words, our erection superintendent is at Hamilton. He may send a man from Hamilton or he may engage some-
[fol. 125] body at a distance who is contracting into this work.

Q. That's what I wanted to get at. The people who do the actual installation are not your employees, are they?

A. It couldn't be because we do not have ironworkers in our factory, and this work is done by ironworkers.

Q. So that you always hire somebody to make the installation?

A. We usually furnish a superintendent, and then he gets the ironworkers to do the work.

Q. Yes, sir. And that is the general practice in the industry?

A. General practice in the industry.

Q. Now, would you be so kind as to describe for us the linings in bank vaults? Just what is that when you refer to the linings that you sell?

A. In the structure of a bank vault there are the walls, the top, bottom, back and the front, which are made of masonry. They are an integral part of the building.

In many cases the customer, the architect or the bank desires to have a square vault or to have a vault that is relatively free from moisture or to add to the masonry walls, to increase the burglar protection of the vault; and in those cases we furnish a steel lining; in other words, a steel wall, steel top and bottom, a steel back and a steel front.

[fol. 126] And that is then made a part of the vault, tied into it, and it is then tied into the door—yes, tied into the door. The door is tied to it.

Q. Yes. Now, those are large sheets of metal, are they no?

A. Oh, no. They are not sheets of metal. They are from half inch to four inches thick.

Q. But they are made of metal?

A. Yes. But "sheet" is gauge metal.

Q. I beg your pardon. I am not familiar with the terms.

A. "Plates" are thickness metals.

Q. And these are plates?

A. That's right.

Q. And sometimes are those linings installed by the contractor who is doing the rest of the construction of the vault exterior?

A. There may be some cases. There are none in our case as far as we are concerned. We would not let them do it.

Q. In other words, you handle that the same way you handle the installation of the vault doors?

A. It's just as scientific to put a lining in—as a matter of fact, it's a little more scientific—as it is to put a door in. [fol. 127] Q. In any event, however, difficult it is, the way you actually install it is by making a contract with somebody to do it under your supervision?

A. Not making a contract. Our supervisor goes there. He engages ironworkers from the nearest ironworker hall; and under his supervision and with our drawings and with the architect's approval, we make the installation.

Q. Thank you. Are linings for bank vaults supplied by Mosler and Diebold as well as your company?

A. They are in their literature, so I suppose they do.

Q. Yes. They are also supplied, are they not, by the Murray Safe Company?

A. Murray Safe Company?

Q. Yes, sir.

A. Murray Safe Company is a jobber.

Q. How about the Murray Company?

A. Murray Company might be an erection company or something of the sort. They are not a recognized manufacturer such as the area in which we are discussing this matter.

Q. There are some other companies, however, that supply linings for bank vaults, are there not?

A. Not as a regular business.

Q. Well, can bank vault linings be obtained from other

[fol. 128] types of company than yourself and Diebold and Mosler?

A. Why, I suppose that you could do it if you chose to.

Q. It has been done, hasn't it?

A. Well, it may be. Not to my knowledge.

Q. I would like to direct your attention to items that you called security and collateral chests. Are those—Well, will you describe those for us?

A. The use of collateral and security chests or lockers is a lockup or an individual steel safe, as you choose to call it that, in the vault. They are never used outside of the vault. They get the protection of the vault itself.

In the case of fiduciary records, they are built in such fashion that single custody is not available. In the case of a teller, teller's collateral vault or teller's cash vault, they are built in such a fashion that the head teller can get in and also the teller who is involved can get in.

They are built in all sorts of arrangements, but they are for the individual locking, individual storage, of certain types of funds, securities, whatnot, used by the financial institution.

Q. Does the American Bank Equipment Company sell security and collateral chests?

[fol. 129] Q. I reckon they would if you gave them an order.

Q. Do they make them?

A. I reckon they would if you gave them an order.

Q. How about the Protection Equipment Company?

A. Up in Minneapolis? In Minneapolis?

Q. I think so.

A. Well, I think between the two of them, they might make two orders a year.

Q. But they do make them and they can make them?

A. Well, they might make a couple.

Q. Did you ever hear of the Gross-Fieble Company?

A. Oh, yes.

Q. Where are they located?

A. They are at Hillsboro, Ohio.

Q. Do they make security and collateral chests?

A. They make collateral lockers, teller's lockers, for the teller's bank—or teller's funds. We are talking about

bigger lockers, you know, and chests. We are talking about units that may measure two inches in thickness.

Q. Yes. But, if you will help me, I will try to move along as fast as I can.

A. I am trying to do the best I can to help you.

Q. You have been very helpful, and I want to thank you. [fol. 130] The Gross-Fieble Company makes a variety of equipment for banks, does it not?

A. They make boxes, safe deposit boxes. Now, when I say a box, that's the language of the industry. That means a safe deposit box. They make safe deposit boxes. They make a few light lockers. They make a night depository and they make a few windows. Yes, sir.

Q. And Protection Equipment Company, American Banking Equipment Company make some or all of those items too, don't they?

A. No.

Q. Don't they make trust department chests?

A. No.

Q. Don't they make safe deposit boxes?

A. No. Oh, wait a minute. American Bank Equipment does, yes.

Q. Yes, sir. Does Security Safe Deposit Box Company make safe deposit boxes?

A. Security?

Q. Yes, sir.

A. You will have to get him to help you on that one. I don't know that.

Q. Security Safe Deposit Box Company?

A. I don't know. Never heard of them.

[fol. 131] Q. Now, night depositories and drive-in windows. Those are not part of the vault itself, are they?

A. No, but they are an item that we manufacture.

Q. Yes. And they are made by a number of companies in addition to yours, Diebold and Mosler, aren't they?

A. I would say perhaps two.

Q. Would you name them?

A. Protection Equipment Company and Gross-Fieble.

Q. How about Hegeo Industries, Incorporated?

A. Who?

Q. Hegeo?

A. He might make one once in a while.

Q. Yes. How about Florida Safe Service?

A. They make a few windows, plate glass in them, not bulletproof glass.

Q. How about Cramer Safe Company?

A. They are owned by Mosler. They are a service organization.

Q. Now, the Herman Safe Company makes some of these items too, doesn't it?

A. They do not.

Q. They don't make any of these?

A. They sell mine.

Q. Now, we move on to the category that you listed [fol. 132] as "other products." In the fire resistive line, all your other products, all your other lines, there are a great many people in that field, aren't there, that manufacture those items?

A. Yeah.

Q. Remington Rand is one of them?

A. Right.

Q. Are they a competitor?

A. They are a competitor?

Q. Are they an important competitor?

A. They are on insulated files.

Q. And that's a very big item in your business, isn't it?

A. Well, you sell it, their files.

Q. Diebold doesn't make them, insulated files?

A. No.

Q. But you do, Herring-Hall-Marvin does?

A. Yes, we do. Very small volume, but we make them.

Q. Yes. And in this fire resistive line we are talking about, where there are a number of competitors—that includes fire resistive safes and fire resistive vault doors and also the money safes—there are a great many people who manufacture all of those, aren't there?

[fol. 133] A. No, I wouldn't say a great many, Mr. Fortas. Now, do you want to mention some names or shall I?

Q. Well, why don't you do it? Let's take the category of safes first.

A. Safes?

Q. Yes, sir. And now we are talking about five resistive safes.

A. Yes. Now, we are talking about, and you are very

explicit in getting the record correct, and we ought to get the record correct here—We are talking about fire resistive safes in the manner of free-standing fire resistive safes. Free-standing?

Q. That's the way you used the term in your testimony?

A. Yes.

Q. Yes. Thank you.

A. In other words, they are not built into a wall. They are standing just as free as that chair.

Q. Yes, sir.

A. Yes, and they have doors that swing?

Q. I just want you to talk about the term as you used it in your direct testimony, if that's the way you used it in your direct testimony.

A. Is that what I said?

[fol. 134] Q. You said "safes."

A. Safes.

Q. If that's the way you used it in your direct testimony, I thank you for the explanation.

A. Yes. Now, on the safes—and I am talking about free-standing, fire resistive safes, with swinging doors—Remington Rand is in that business. So is Shaw Walker.

Q. That's a very big company, isn't it?

A. Yeah. So is Meilink at Toledo, and so is Schwarb, Lafayette, Indiana.

Q. Are all of these big companies in the field?

A. No.

Q. But Remington Rand, Shaw Walker are?

A. Are big, but they are big on insulated files that slide. They are not big on the safes. That's why I was getting this distinction here.

Q. Yes, sir.

A. Then there is Herring-Hall-Marvin, Diebold and Mosler. And each of us have a little distributing company, known as the Hall Safe Company in our case. Diebold is York Safe Company, and Mosler's is Protecto. And we all make safes and put those other labels on them.

Q. You have competing brands within each company, don't you?

[fol. 135] A. That's right. Duz and whatever the other thing is that the soap people make.

Q. Yes, that Duz does everything, and this other brand does it too.

A. So much better. (Laughter.)

Q. There are a lot of companies that make safes, aren't there?

A. I have mentioned them.

Q. Well, doesn't the Art Steel Company make the Guard-All safe?

A. No.

Q. It doesn't?

A. No.

Q. Does Art Steel Company make any safes?

A. No. They make files.

Q. They make files?

A. (Nodding.)

Q. How about the Guardsman Safe Company?

A. Guardsman is a name. Guardsman is a name, if I remember, and the man is now working—He is out of business, and he is now working for R. C. Allen, I believe.

Q. Does Allen make safes?

A. They make adding machines.

Q. How about Valentine Safe Company?

[fol. 136] A. Oh, I can't tell you anything about that. It's up in Northern Indiana and it's—I don't know.

Q. How about the Brush Safe Company?

A. Brush. John Brush makes one safe, just one, and it's about big enough to put that case in (indicating), and that's all.

Q. Well, I won't bother to press this any more.

Now, I believe you testified—and if I am wrong, please correct me—that there are many companies that make the insulated files?

A. Shaw Walker does a big job on insulated files, and Remington Rand does exactly as good a job. Meilink makes an insulated file, and so does Murphy, the Murphy Company in Louisiville; and we make one.

Q. Remington Rand?

A. I mentioned them.

Q. Murray Metal?

A. No.

Q. Schwarb?

A. No.

Q. Does Art Metal Company sell insulated files?

A. I understand they sell Remington Rand's files; yes, sir.

Q. Now, does what you have said with respect to the [fol. 137] presence of other companies apply in general to the manufacture and sale of money safes?

A. There are quite a few people, small people, who make a few money safes.

Q. And the people that you have named who make fire resistive safes also make money safes?

A. Diebold, Mosler and Herring-Hall-Marvin make money safes.

Q. Name some of the others, will you?

A. Gary on the west coast.

Q. Meilink?

A. No. Oh, I am mistaken. I think they have a little setup on that.

Q. Schwarb?

A. A few.

Q. Any others you can think of right now?

A. No.

Q. Now, you make security files, don't you?

A. That's right.

Q. Is that a large business? In the year 1958, let's take it.

A. Calendar year?

Q. Yes.

A. Yes, pretty good.

[fol. 138] Q. And do you know that Diebold does not make those?

A. So far as I know, they do not.

Q. And I believe you testified that you make certain radiation shielding equipment. That's true, isn't it?

A. That's right.

Q. So far as you know, Diebold does not?

A. Oh, yes.

Q. They do?

A. (Nodding.) All three of us do.

Q. Do you think that Diebold makes blast doors?

A. I wouldn't want to say they make them in that category, with that title on them, but they have made radiation shielding doors or doors for that purpose.

Q. You could be wrong about that?

A. I could be wrong.

Q. Yes. Do you make under-the-counter equipment for banks?

A. Yes, sir.

Q. Do you make what is called buses?

A. Yes, sir.

Q. Is a bus a wheeled vehicle to move cash?

Q. That's right; well, to move records.

Q. By the way, banks buy insulated files, don't they?

[fol. 139] A. Very seldom.

Q. Do you make field safes?

A. Yes.

Q. Your bank vault door business in terms of your overall sales revenue is less than half of your business, is it not? Is my question clear?

A. No.

Mr. Fortas: Would you read it back?

(Last question read by the reporter.)

Q. I will rephrase that. Is it not true that less than half of your sales revenue comes from bank vault doors?

A. I would have to check that.

Q. Can't you answer that offhand?

A. I don't seem to have those figures in my mind. I haven't got them written anywhere.

Q. Well, the answer to that is that it is considerably less than half of your sales revenue, isn't it?

A. I said I would have to check that.

Q. Do you know when the Chubb Company of England first entered the bank vault door business here?

A. In America?

Q. Yes.

A. The United States?

[fol. 140] Q. Yes, sir.

A. The first we heard of them was, I would say, about 1956.

Q. You said that you knew of a case in which Chubb was the successful bidder. Was that a very large bank in New York?

A. No. No.

Q. There may have been other cases in which Chubb was the successful bidder that you haven't heard of?

A. That's right. And I don't think that the job you spoke of is installed. I think they have a sale, but it's not installed.

Q. So that would be case number 2?

A. Yes. It would be after it's installed.

Q. Yes, sir. As a matter of fact, the truth of the matter is that the market in terms of the number of potential customers for bank vault doors, bank vault linings, is very limited; isn't that right?

A. Let me see if I understand your question. The market is a limited market?

Q. Yes. It's limited to the number of new bank buildings that are built or to the major reconstruction of bank buildings?

A. New projects or remodels?

[fol. 141] Q. Yes. So it is limited to that, is it not?

A. Oh, yes.

Q. And isn't it also true that, generally speaking, your customers, namely the banks, these days in many instances are very large, powerful institutions, financially powerful?

A. (Nodding.) Of course, a great many of our customers are new banks.

Q. Or branches these days?

A. Yes.

Q. Is the answer to my question "Yes"?

A. No.

Q. I beg your pardon.

A. I was trying to search my mind.

Q. I beg your pardon. Yes. Thank you.

A. That is because the big installations were done in 19—roaring 20's. There haven't been many of those; but there have been an awful lot of new banks where small doors and small installations are put in.

Q. Branch banking is extending, isn't it?

A. In some areas where they have legislation that makes it possible.

Q. And it is true that there have been a good many mergers in recent years of banks?

A. That's principally the east.

[fol. 142] Q. But it has happened?

A. And the west.
Q. But it has happened in the east and the west?
A. (Nodding.)
Q. Mr. Mosman, you were examined by counsel for the plaintiff with respect to discussion of plans of what was going to happen to the Herring-Hall-Marvin assets.

Mr. Monroe: Could I make a suggestion? When you get to a convenient stopping place, could we recess for a couple of minutes?
Mr. Fortas: Sure, by all means. I think this is a very good point.

(Thereupon, a short recess was taken.)

Mr. Fortas: Just strike that last question.

Q. Mr. Mosman, there are dealers in second-hand bank vault doors, are there not?
A. Uh-huh.
Q. And those dealers are throughout the country?
A. Well, not exactly throughout the country.
Q. Well, here and there in a number of cities; is that right?
A. I can remember two at the moment.
Q. There may be more?
A. Could be.
[fol. 143] Q. And they buy and sell used bank vault doors?
A. Yes.
Q. You were asked by counsel for the plaintiff about whether you are a stockholder of Herring-Hall-Marvin. How much stock in Herring-Hall-Marvin do you own?
A. A substantial amount.
Q. Would you state the number of shares, please?

Mr. Monroe: Go ahead.

A. 5250.
Q. And what's the total outstanding?
A. 5890.

Mr. Williams: I am sorry, sir. I didn't get your answer to the previous question, the number.
The Witness: 5250, 5890. I would look in there (indicating) to refresh my memory, but I am sure Mr. Fortas would want to take it.

Q. Look in what?

A. Look in that book.

Q. Is that book to which you are pointing one which has information in it concerning the business of Herring-Hall-Marvin?

A. Yes.

Q. Does it have figures in it with respect——

A. You have got the figures. They are right there [fol. 144] (indicating).

Q. Just a moment. Does that book to which you are pointing have figures in it with respect to sales of Herring-Hall-Marvin parts?

A. No.

Q. Will you describe the contents of that book?

A. It's a statement of June 30, 1959, statement of conditions, profit and loss.

Q. I ask that it be produced for our examination.

A. You've got it right there (indicating).

Q. I ask that that book in front of you be produced for our examination.

Mr. Monroe: Let me confer with you a minute.

Technically, I don't think you have got the right to get it.

Mr. Fortas: I would like to get it. We may have a difference of opinion about that.

Mr. Monroe: Well, you may get it with a subpoena, but I don't think you can make us produce it.

If you don't object to giving it to them, it's an expensive formality to subpoena.

The Witness: First I will look and see as to whether my [fol. 145] figure as to how many shares are outstanding is correct. That's what I wanted to look at in the beginning (examining book). 5890 is right. (Handing book to Mr. Fortas.)

Mr. Fortas: Thank you. I note that the witness has handed me a blue-covered book which has on it—Don't put those papers away, Mr. Mosman—which has on it a label, "Herring-Hall-Marvin Safe Company, Balance Sheet and Statement of Income, June 30, 1959"; and I will mark that for identification as Defendant Diebold's Exhibit number 1.

(Blue-covered book, labeled "Herring-Hall-Marvin Safe Company, Balance Sheet and Statement of Income, June 30,

1959" was marked Defendant Diebold's Exhibit No. 1 for identification.)

Mr. Monroe: Have they got that?

The Witness: Why, certainly. It's right there. May I see that thing?

(Document handed to witness.)

Mr. Monroe: It's got a different breakdown, hasn't it?

Mr. Fortas: Let me go off the record.

(Discussion off the record.)

Q. Mr. Mosman, you own then about 88 percent of the stock of Herring-Hall-Marvin; is that correct?

A. Approximately.

[fol. 146] Q. Does that include any stock that Mrs. Mosman may own?

A. (Shaking head.)

Q. How much stock does Mrs. Mosman own?

A. None.

Q. Now, I noted that when you handed me the blue book, Defendant Diebold's Exhibit number 1 for identification, you took out of it certain sheets. Would you state the subject matter of those sheets?

A. Those are some private papers of mine (handing papers to Mr. Monroe).

Mr. Monroe: If you have no objection, let him look at all of them except the one.

Mr. Williams: The one we have already marked?

Mr. Monroe: Yes.

Mr. Fortas: I note for the record that the witness on the advice of his counsel has handed me a number of sheets, which is the batch referred to in the previous question, but has removed therefrom the document marked "A" which has been the subject of a previous conversation of counsel.

Mr. Monroe: We will treat this as having been subpoenaed, saving you——

Mr. Fortas: Thank you. Yes, sir.

[fol. 147] We will go off the record.

(Discussion off the record.)

Q. Mr. Mosman, the sale of Herring-Hall-Marvin to Diebold as covered by the contract which has been identified here included all of Herring-Hall-Marvin as a going concern, did it not?

A. Can't we wait until we dispose of this other matter?

Q. Sure.

(Counsel examine documents.)

Mr. Fortas: I should like the record to show that we have examined and are returning to the witness the papers heretofore submitted to us.

I should also like to say that with request to Defendant Diebold's Exhibit number 1 for identification, it appears that there are some discrepancies in the figures between this and Plaintiff's Exhibit number 2 for identification. That's probably due to the fact that one is a statement of accountants and the other is the internal company's statement. But for the present purposes, I am not interested in pursuing that.

Mr. Kramer: Are you returning it?

Mr. Fortas: I am returning the exhibit to the witness. [fol. 148] but the identification of the exhibit will stand on the record for these discovery proceedings. And I thank you very much.

Q. Now, my last question, Mr. Mosman, was whether the agreement as to the sale of Herring-Hall-Marvin to Diebold included the sale of Herring-Hall-Marvin as a going concern with all pertinent assets, business, et cetera?

A. You have the contract. It's set out. What we sold is in the contract, sir.

Q. It was your understanding that it was to be sold as a going concern?

A. Everything that we were selling is right in the contract. You have a copy of the contract.

Q. What was your understanding, Mr. Mosman?

A. My understanding was whatever the contract called for we were to deliver. Now let's get the contract and read it.

Q. Do you refuse to answer my question?

A. I am not refusing to answer anything.

Q. Are you telling me that your understanding was limited to the words in the contract?

A. That's right. That's what the contract was for.
Q. All right.

[fol. 149] Mr. Monroe: I would like to note my objection to the question anyway.

Q. Is it your understanding that the corporation was to be sold, the corporate entity?
A. No.
Q. You were to retain the corporate entity?
A. That's right.
Q. Who was to have the right to use the name Herring-Hall-Marvin?
A. I have got to go back to the contract. It's in the contract.
Q. You mean Diebold?
A. Of course.
Q. Yes.
A. How did you stipulate that? Excuse it.
Q. You answer my questions. That's the purpose of these depositions, Mr. Mosman.
A. O. K.
Q. Now, in your answers to the questions asked of you by counsel for the plaintiff you referred to some discussions with respect to personnel. Was it not your understanding that personnel that wished to do so, that were willing to do so, would be taken over by Diebold?
A. That's my understanding.
[fol. 150] Q. Now, was it not your understanding that you personally were being employed pursuant to an employment contract which has been identified here for the purpose of the Herring-Hall-Marvin Division or Corporation, or whatever it might turn out to be, in the conduct of its business?

Mr. Monroe: May I interrupt just a minute? You are asking him a lot of questions about the contract.

Mr. Fortas: No, I am not. I am asking him as to his understanding.

Mr. Monroe: Just to save time, I would like to make a standing objection as to these questions as to the contract. I think the document speaks for itself.

Mr. Fortas: I am not asking him that.

Mr. Monroe: It will save me interposing.

Q. I am asking you whether it was your understanding that the purpose of the employment contract was that you were to perform services in connection with the business of the Herring-Hall-Marvin Company or Division, whatever it might turn out to be?

A. Generally speaking, that's right, although the contract —(Conferring with Mr. Monroe.)

Q. Now, the contract states that you were to be—You [fol. 151] had a contract of employment for nine years at $50,000 for five years and $25,000 for the remaining four years.

Was it your understanding that you were to have, in return for that compensation or as part of the return for that compensation, a position as general manager of Herring-Hall-Marvin?

The Witness: May I have a minute to speak to him? (Conferring with Mr. Monroe.)

Mr. Monroe: Read his question back to me, please.

(Last question read by the reporter.)

A. Yes.

Q. As a matter of fact, you contemplated that you would incur expenses in connection with the performance of your duties, did you not?

A. Of course.

Q. And isn't it true that the addendum to the employment contract, which is Plaintiff's Exhibit 7 for identification, was executed for the purpose of taking care of those expenses?

A. I believe that's right.

Q. So it was contemplated that Herring-Hall-Marvin would continue as a going business and that you would be actively engaged in the work of that company?

[fol. 152] Mr. Williams: Just a moment. I object to that question unless the witness understands what the term "going business" means. I would like for that to be explained.

Q. Can you answer the question as I phrased it? Would you like to hear it again, Mr. Mosman?

A. Yes. I would like to hear it again.

Q. Oh, well, I will withdraw the question so we can get along here.

Mr. Mosman, the record shows that the option agreement, that is to say, the agreement by which Diebold was given an option to buy Herring-Hall-Marvin, was signed on June the 16th. Is it not the fact that on July 9 counsel to Herring-Hall-Marvin, by order of the board of directors of Herring-Hall-Marvin, sent to Diebold a notice purporting to terminate the option and the purchase agreement?

A. I don't know the date.

Q. Do you know that such a notice was sent?

A. Yes. I don't know that that's the date.

Q. I show you a copy of a telegram from Alexander J. Moody to Mr. Raymond Koontz, president, Diebold, Inc. Will you identify Alexander J. Moody?

A. He is one of the lawyers with Winston, Strawn, Smith and Patterson.

[fol. 153] Q. Did he represent you?

A. That's right.

Q. He represented you at about this time, namely, June and July of this year?

A. That's right.

Q. Will you look at this teletape and tell me——

Mr. Williams: At what?

Q. ——at this copy of a telegram and tell me whether that refreshes your recollection as to the date of the notice of the attempted termination?

A. I believe that date is right.

Q. Had you seen a copy of that telegram before I showed it to you here?

A. I believe I have, yes.

Q. Now, did Mr. Moody at any time advise you that he had received a telegram from Mr. Koontz in reply to the telegram that I have just shown you?

A. That's right.

Q. Did he ever show you a copy of that?

A. I am not sure that he did.

Q. I now hand you a copy of a telegram from Raymond Koontz, president, to Alexander J. Moody, and ask you whether you can identify that?

(Counsel and witness examine document.)

[fol. 154] Mr. Monroe: What was the question?

(Pending question read by the reporter.)

A. I didn't receive the wire.

Q. No. But I asked you whether Mr. Moody had ever shown you a copy of the wire; and you said, as I understood you to say, that you weren't sure one way or the other.

A. That's where I am right now.

Q. I ask you whether this refreshes your recollection?

A. I am still where I was.

Mr. Williams: Excuse me. I would like to object to further questioning with respect to the transfer—or communications passing between these two companies on the grounds that it's beyond the scope of direct examination and it has no bearing on this case.

Mr. Fortas: Will you kindly mark this copy of a telegram from Moody to Koontz, which has been referred to, as Defendant Diebold's Exhibit 2 for identification and mark a copy of a telegram from Koontz to Moody as Defendant Diebold's Exhibit 3 for identification?

(Above referred to copy of telegram from Alexander J. Moody to Raymond Koontz and a copy of a telegram from [fol. 155] Raymond Koontz to Alexander J. Moody were marked Defendant Diebold's Exhibits Nos. 3 and 4 respectively, for identification.)

Mr. Williams: I object to further communications passing between Diebold, Incorporated and Herring-Hall-Marvin on the grounds that it's not relevant and beyond the scope of the direct examination. I merely put that on the record so I don't have to repeat it.

Mr. Fortas: Yes. I understand the procedure.

Mr. Reporter, will you now mark the document I hand you as Defendant Diebold's Exhibit 4? For the purpose of clarity, I want to say that it is a copy of a telegram from Raymond Koontz to Warren Mosman, Lake Placid Club in New York.

(Above referred to copy of telegram from Raymond Koontz to Warren Mosman, Lake Placid Club, was marked Defendant Diebold's Exhibit No. 4 for identification.)

Q. My question, Mr. Mosman: Referring to Defendant Diebold's Exhibit 4 for identification, can you identify that as a telegram that you received?

A. Yes.

Q. Thereafter, on June 11 at Lake Placid, did you have a discussion with Mr. Koontz about this contract?

Mr. Monroe: Excuse me. Is there a change in the date? [fol. 156] Did you say June the 11th?

Mr. Fortas: July 11, I thought I said. I should have.

A. Yes.

Q. Did you mention to him what you considered to be the reason for the attempted termination?

A. Yes.

Q. And what was that?

The Witness: Excuse me.

Mr. Fortas: Just a moment now. I am not at all sure about this procedure, Mr. Monroe. I think that maybe the witness ought to answer this without consulting counsel, don't you? Certainly, the last thing in the world I want to do is to be discourteous to you, but I do think that the witness really ought to answer without consulting counsel.

Mr. Monroe: I think he is probably right.

A. We made an agreement——

Q. Sir?

A. We made an agreement——

Q. That's not my question.

A. I have to answer your question with an explanation.

Q. Oh, I see. I am sorry. Go ahead.

[fol. 157] A. We made an agreement with your people that this thing would be done in strictly a confidential manner. There would be no publicity on it. One of your people told the competitors, both of them, that this sale was on, and set the woods on fire. We had publicity all over the United States that we had sold out to Diebold.

In our opinion—That's the basis for this.

Q. You didn't claim, did you, that that was a breach of the contract in your conversation with Mr. Koontz? You didn't make such a claim, did you?

A. I wouldn't know. So many things said, I wouldn't know. I can't tell you.

Q. Now, are you saying that you had insisted that the arrangement be kept secret?

A. Absolutely.

Q. And now you say that due to a statement made by one of Diebold people——

A. That's what I am told.

Q. ——word got out?

A. That's what I am told.

Q. As a matter of fact, was it not Mr. Koontz who told you that?

A. That's true.

Q. That he understood that it had been done?

[fol. 158] A. That's true.

Q. It was not Mr. Koontz, was it, who made the statement?

A. I don't know.

Q. Now, you said that the woods were set on fire.

A. You don't like that expression?

Q. I am delighted with it, but I wish you would explain and——

A. I mean that in——

Q. Just what do you mean by it?

A. I mean that within every corner of the United States, within a few hours, this whole thing was out. It's been out ever since.

Q. Was it published in any paper?

A. No.

Q. Was it published in any trade journal or otherwise?

A. No. It didn't have to be. It was word of mouth, expertly done.

Q. Now, at the July 11 meeting with Mr. Koontz, you told him that you were not going to go ahead with the contract; isn't that right?

A. I don't know that I ever said it in those words, no.

[fol. 159] Q. Did you say that in substance?

A. I said, I don't know that we have ever said it in those words.

Q. I said: Did you say that in substance?

A. I told him that we sure weren't interested in going any further with the deal; he had breached it.

Q. You didn't claim that that was a breach of contract, did you?

A. Well, may I retract it? He had sent out publicity which was absolutely in a contract what we agreed.

Q. Well—Now, did you have a meeting in Cincinnati thereafter?

A. Yes, sir.

Q. And was that on July 15?

A. Well, if anyone has got a calendar, why, we can see. It was on a Wednesday. It would have to be the 15th.

Q. And at that time you again told Mr. Koontz that you were not going to perform your contract, didn't you?

A. Did I? I don't think I did. We tried to work out the situation with him.

Q. Mr. Koontz had told you at the end—Well, let me withdraw that.

[fol. 160] Towards the end of June, isn't it a fact that one or maybe two of the Diebold officials had gone through your plant at Hamilton?

A. One.

Q. Was that Mr. Robinson?

A. That's right.

Q. And thereafter is it not true that Mr. Koontz called you and told you that Diebold was ready to exercise the option? To help you place that, you went up to Lake Placid on July 2, did you not?

Q. And a day or two before you went up there Mr. Koontz called you and told you that they were ready to exercise the option; isn't that correct?

A. I remember a conversation along that line, yes.

Q. On July 17 Diebold—On July 15, that is the same date as that meeting in Cincinnati to which we have just referred, is it not a fact that Diebold served on Herring-Hall-Marvin Safe Company and on you a notice of the exercise of the option?

Mr. Fortas: May I ask that this document which is a letter signed by Raymond Koontz to Herring-Hall-Marvin Safe Company and Mr. Warren Mosman, dated July 15, be marked as Defendant Diebold's Exhibit 5 for identification?

[fol. 161] (Letter signed by Raymond Koontz to Herring-Hall-Marvin Safe Company and Mr. Warren Mosman, dated July 15, 1959, was marked Defendant Diebold's Exhibit No. 5 for identification.)

Q. Mr. Mosman, would you take a look at Exhibit 5 for identification and please identify it?

(Mr. Monroe and witness examine document.)

Q. Can you identify that?

A. Yes.

Q. Does that refresh your recollection, Mr. Mosman, about that July 15 meeting? Isn't it a fact that at that meeting you told Mr. Koontz that you were not going to perform and Mr. Koontz insisted that he was going ahead with it, and then Mr. Koontz caused the notice of exercise of the option to be served on you?

A. It was served on me about 3:00 o'clock.

Q. But didn't that refresh your recollection that you at the July 15 meeting continued to take the position that you wouldn't perform for the reasons that you are here stating?

A. We had another conversation after that at the Queen City Club with Mr. Koontz, and that afternoon they served that paper on us.

Q. Yes, sir. I am sorry; perhaps I am not making myself clear. What I am asking you is whether you cannot [fol. 162] now recall that at the July 15 meeting with Mr. Koontz you continued to take the position that you would not perform, and Mr. Koontz insisted that you do perform and advised you that the notice of exercise of option would be served that day?

A. (Nodding.)

Q. Is that correct? The reporter can't get your nods.

A. We had conversation at Lake Placid. We continued the conversation at the Queen City Club. The upshot of it was, I got in my car so I could be up there when this gentleman right over there (indicating) and your law partner served this thing on me.

Q. But you still were taking the position that you were not going to perform; is that right, on July 15, the day that the notice of the exercise of option was served?

Mr. Fortas: I am sorry. Mr. Monroe, what do you think now?

Mr. Monroe: I think he has got a right to confer with me.

Mr. Fortas: I think he has got a right to confer with you on any questions of law and privilege, but not about his testimony. And I really find this very embarrassing to me, as I am sure it must be to you.

[fol. 163] Mr. Monroe: I don't recall that there has been any problem about this before, Mr. Fortas.

Mr. Fortas: No, sir. I haven't raised the question until the last time it was done because this is a relatively informal proceeding. But, nevertheless, I don't think that the witness is permitted to consult with counsel about any matters except questions of law.

Mr. Monroe: Now, does the record show that at the last time you raised this question that there was no consultation?

Mr. Fortas: It should. There was no consultation the last time I raised this question, for which I am very grateful to Mr. Monroe, because I did not question the point.

Mr. Monroe: I have told him to go ahead and answer the question.

Mr. Fortas: Thank you, Mr. Monroe. I knew you would.

The Witness: There has been so much conversation since you asked me the question that I have forgotten the question.

Mr. Fortas: I have too. Would you read it back, Mr. Reporter?

[fol. 164] (Record read by the reporter.)

Mr. Monroe: Go ahead and answer it.

A. We finally agreed o have the option served on us, so that indicates that we had decided to do it.

Q. Well, in any event, is it your testimony that up to that point, from July 9 up to that point on July 15, you were taking the position that you were not going to perform the contract?

A. I think that's a fair statement.

Q. Thank you.

Mr. Monroe: Now, before we go on, I would like to confer with my client.

Mr. Fortas: Yes, sir. Surely, Mr. Monroe.

(Mr. Monroe and witness leave hearing room and return.)

Q. Following the service of the notice of exercise of option, wasn't there a meeting in Chicago on July 17 at the offices of Winston and Strawn?

A. Yes.

Q. And Winston and Strawn were your lawyers?

A. Yes.

Q. Incidentally, Mr. Mosman, the contract did require that you, in addition to your capacity as president of the company—and chairman of the board, were you?

[fol. 165] A. President.

Q. You were just president of the company and a member of the board?

A. Yes.

Q. And in addition to your actions in those capacities, the contract did require you as a stockholder to vote your shares in favor of approval?

Mr. Monroe: I am going to object to that. I think the contract speaks for itself.

Mr. Fortas: All right, sir.

Mr. Monroe: You can go ahead and answer it now.

Mr. Fortas: All right, sir.

Q. The July 17 meeting—Strike that, will you, please? Winston and Strawn were your lawyers? I don't know whether you previously testified to that.

A. They are. They were and are.

Q. And at the July 17 meeting in Chicago did you insist upon certain changes in the contract?

A. Yes. They are in those——

Q. They are reflected in the documents?

A. Uh-huh.

Q. And you said that you would not sign the contract [fol. 166] unless those changes were made?

A. I don't remember saying that.

Q. Was that the substance of your position as expressed to the conferees at that time?

A. May I see the option agreement before I answer that question?

Q. Yes, sir. I hand you Plaintiff's Exhibit 3 for identification, which is the option agreement, to which the contract of purchase and sale is attached (handing).

A. (Examining.)

Mr. Monroe: What is the question before the witness, may I ask?

(Last two questions read by the reporter.)

A. I don't remember telling them that I wouldn't sign the contract without these changes. And in the option agreement there is an item here that says that we can make such changes or amendments thereto as may mutually be agreed to—agreeable to the parties.

In other words, at the signing we could make whatever agreements that we want, and those were the things that I brought up at that time.

Q. Yes, sir. Now, isn't it a fact then—just to get the chronology here correct—the amendments were made to the contract in the course of the meeting on July 17 and, [fol. 167] as amended, the contract of purchase and sale was signed?

A. That's right.

Q. Now, isn't it a fact that at some time or times between July 17 and August the 6th, I will say, you expressed your intention not to go through with this contract?

A. No. I was on a vacation practically the whole of that time. I was in Maine.

Q. Did you communicate with your lawyers concerning that matter?

A. No, sir, not that I know of.

Q. Did you communicate with your lawyers concerning any matter during that time?

A. Not that I know of.

Q. Did you give your lawyers any instructions during that time?

A. Not that I know of.

Q. When did you first communicate with the United States Department of Justice or any representative or official thereof concerning this matter?

A. On Monday, August 17th.

Q. August what?

A. 17.

Q. Do you know of anybody who communicated with the Department of Justice concerning this matter prior to [fol. 168] August 17?

A. No. I have a letter from Mr. Strawn——

Q. What was that comment?

A. A letter from Mr. Strawn, acknowledging receipt of this letter from the Department of Justice, a copy of which you have.

Q. That letter from the Department of Justice to which you are referring was the letter of August 6?

A. That's right.

Mr. Monroe: Could I confer with him a minute? I would just like to suggest something to him.

Mr. Fortas: Sure.

(Mr. Monroe and witness confer.)

Mr. Monroe: Would you mind reading the last? I think we have got a misstatement to your question.

Mr. Fortas: Thank you.

(Record read by the reporter.)

Q. Would you like to amend, qualify or change any of your previous answers?

A. No. Everything I said is all right. Mr. Monroe reminds me that my Washington—my Chicago attorneys told me that one of Diebold's lawyers had seen the Department. I think they learned that from a conversation with opposing lawyers on the previous day, whatever that date would be. [fol. 169] Q. Previous to August 6?

A. Previous to August 17.

Q. August 17?

A. (Nodding.)

Q. Do you have any knowledge whatsoever of any communications by anyone to the Department of Justice with respect to this matter prior to August 17, with the exception that you have stated?

A. No.

Mr. Fortas: Now I should like to mark for identification a copy of the August 6 letter from the Department of Justice, to which reference has been made, and the copy that I am offering is signed by Mr. Robert A. Bicks, Acting Assistant Attorney General, to Mr. Raymond Koontz, dated

August 6, 1959. I ask that that be marked as Defendant Diebold's Exhibit 6 for identification.

(Copy of letter dated August 6, 1959 to Mr. Raymond Koontz from Mr. Robert A. Bicks, Acting Assistant Attorney General, was marked Defendant Diebold's Exhibit No. 6 for identification.)

Q. I would like to ask, Mr. Mosman, whether you have a copy of the letter that the Department of Justice sent to Herring-Hall-Marvin? Do you have that with you?

(Witness examines papers.)

[fol. 170] Mr. Monroe: Do you want it? Is that your question?

Mr. Fortas: Yes. I should like that marked.

Mr. Mosman has handed me a copy of the letter to which reference has been made. I would like to have that marked as Defendant Diebold's Exhibit 7 for identification.

(Copy of letter dated August 6, 1959 to Mr. Warren Mosman from Mr Robert A. Bicks, Acting Assistant Attorney General, was marked Defendant Diebold's Exhibit No. 7 for identification.)

Q. Now, do you recall, Mr. Mosman, a telephone call from Mr. Koontz on August 11 in which the receipt of that letter was mentioned to you?

A. Yes.

Q. And did you in the course of that telephone conversation tell Mr. Koontz that you did not intend to perform the contract?

A. No.

Q. Did you say anything to that effect or substance?

A. I told Mr. Koontz that it was a matter for the lawyers, and there was not anything for us to discuss.

Q. Now, did you decide prior to the filing of the complaint in this case, namely, August 24, the issuance of a [fol. 171] restraining order on that same day, that you would not perform your obligations under the contract?

(Witness confers with Mr. Monroe.)

Mr. Fortas: I am afraid the record will have to show a conference between the witness and counsel.

Mr. Monroe: I am going to say this loud enough so Mr. Fortas can hear it. Just explain the situation to him.

A. All right. By terms of the contract we had to send out a notice of our shareholders' meeting on the 20th. You have a copy of that. And it stated in there something to the effect that we had received a letter from the Department and we were going to hold the meeting and adjourn it until such time as the letter from the Department was—that language is there. I will read it to him. He has got a copy too.

Mr. Fortas: May the record show that the witness is now referring to the text of a notice of special meeting of shareholders at Herring-Hall-Marvin Company to be convened August 28, 1959.

A. (Continued.) And this notice includes reference to the letter from the Department of Justice dated August 6; and then it goes on in the third paragraph to say:

[fol. 172] "In view of this letter, the company intends to convene such meeting on August 28, 1959 and thereupon adjourn it without action, and to continue to adjourn such meeting from time to time thereafter, but in no event beyond November 16, 1959, in order that an effort may be made by the purchaser to resolve the uncertainties raised by the letter of the Department of Justice."

Q. Now, the contract required closing on August 31, 1959 unless a restraining order or injunction was in effect. You understood that, did you not?

A. Yes.

Q. When did you make the decision as to the strategy and procedure set forth in the notice of the stockholders' meeting from which you have just read?

A. I didn't make the strategy. My lawyers did. They wrote it. I didn't write it.

Q. Did you approve it?

A. They told me that was the thing to do, and I did it.

Q. Are you suggesting that Winston and Strawn did this without authorization and approval?

A. Hardly.

Q. In other words, you authorized it or approved it or both?

A. I went along with it. Shall we say that?

[fol. 173] Q. Whatever the form of words may be, you regard that as constituting due authorization or approval to your counsel?

A. We sent out the notice in exactly the way, the language, they wrote, and I signed my name to it.

Q. You signed your name to the notice?

A. Certainly. I had to.

Q. Well, all right; I will take that. And in order to comply with the contract and have a closing by August 31, it would have been necessary for you to have submitted the contract at the stockholders' meeting of August 28th; isn't that right?

A. Yes.

Q. And at that meeting of August 28, 1959 you also understood that you had a contractual obligation to vote your shares in the approximately 88 percent in favor of approval; isn't that right?

A. Well, that's right. That's what the contract says.

Q. All right, sir. Now did you have advance information from the Department of Justice of the United States of America that on August 24 they were going to file a suit and seek a restraining order?

A. No.

[fol. 174] Q. In deciding to send out this notice, was your attention called to the fact that the Department of Justice letter to you and to Diebold, Defendant Diebold's Exhibits 6 and 7, expressly stated, and I read, "While we do not mean to imply that this merger necessarily violates the Antitrust Laws, it does raise certain questions under these laws"?

Now, my question to you is whether, before signing the notice of the stockholders' meeting, your attention had been called to that statement in the letter of August 6?

A. I can only answer that question this way. My attorneys in Chicago were in possession of the letter. They wrote the notice of the stockholders' meeting. I went along. I did exactly what they told me to do.

Mr. Fortas: That's not my question. Will you read back the question?

(Last question read by the reporter.)

A. (Continued.) No more than any other part of the letter.

Q. But you were familiar with all parts of the letter?

A. I read the letter and turned it over to my attorney.

Q. Well, do you want us to understand that the decision [fol. 175] reflected in this notice of shareholders' meeting was not to vote your stock to approve the sale at the stockholders' meeting of August 28—was the decision of your lawyers and not your decision?

A. That's true. They wrote the notice. I didn't.

Q. You want us to understand that it was their decision and not your decision?

Mr. Monroe: I think it's quite clear, he acted on the advice of counsel, if that's what you are driving at.

Mr. Fortas: I think that's quite clear. But I am trying to get him to say that he acted, which he hasn't yet said.

A. (Continued.) I sent the notice out. I guess that's action.

Q. All right. As a matter of fact, when you——

The Witness: Could we have a recess?

Q. —wanted to terminate this option on July 9, were you acting on the advice of your lawyers or did you yourself make the decision to attempt to terminate the contract at that time?

A. Mr. Fortas, I haven't made one decision without my counsel being at my side.

Q. I know that, Mr. Mosman. I am asking you whether [fol. 176] you made the decision.

A. I don't think we made the decision. Our attorneys carried out what we together decided.

Q. So you take responsibility for the decision?

A. No. I say that I haven't moved in this thing in any direction without my counsel being at my side.

Q. Yes, sir. But you don't deny that you have moved and it's been your responsibility, on advice of counsel, as you have testified?

A. I don't know that I understand what you just said, because everything that I have done is in the record. And the record—I haven't done anything, as I said before, except what my attorney told me to do.

Q. Now, were you represented at the hearing in the United States District Court on issuance of a temporary restraining order in this matter?

A. No.

Q. Sir?

A. No.

Q. Did you have any notice of it?

A. No.

Mr. Fortas: Excuse me. Off the record.

The Witness: What I would like to do is have a recess.

[fol. 177] Mr. Fortas: All right.

The Witness: Actually, I have obligations at 5:00 o'clock this evening, and here we are, 5:00 o'clock.

Mr. Fortas: I am just about through.

The Witness: I will have a recess and then you can——

Mr. Fortas: All right.

(Thereupon, a short recess was taken.)

Mr. Fortas: Mr. Mosman, I am just about through. We will finish this up fast.

Q. Mr. Mosman, you were asked by counsel for the plaintiff with respect to other approaches or offers or overtures relating to the sale of Herring-Hall-Marvin or of your stock interests therein. Now, let me ask you just very briefly:

Do your holdings in Herring-Hall-Marvin represent a substantial part of your assets personally?

A. That's right.

Q. And has your attention been called to the state tax problem that confronts a person in your situation?

Mr. Monroe: I am going to interpose an objection until we establish the relevancy of this.

[fol. 178] Mr. Fortas: It's related to the problem of a man in Mr. Mosman's position who sells a business.

Mr. Monroe: You can answer it.

A. I am familiar with the estate taxes.

Q. And is that of concern to you in determining on your course of action in business?

A. Well, yes.

Mr. Fortas: All right. That's all. Thank you.

Mr. Monroe: Are you through? Excuse me.
Mr. Fortas: I am through.

Cross-examination.

By Mr. Monroe:

Q. I would just like to ask you one question, Mr. Mosman. I believe that you testified that you had a meeting at the Department of Justice that you attended?

A. (Nodding.)

Q. Would that have been about August 17th?

A. That's right.

Q. Now, did they tell you anything about their opinion as to the legality or illegality of this proposed acquisition?

A. They told me that in their opinion—the people that I was talking to, in their opinion the contract violated the [fol. 179] antitrust laws, and that they were there to see that the antitrust laws were not violated.

Q. Did that influence you at all or your attorneys in writing the notice to stockholders on August 20?

A. No.

Mr. Monroe: All right.

Mr. Fortas: I will have to ask another question, Mr. Mossman.

Cross-examination (Continued.)

By Mr. Fortas:

Q. How long did that meeting of August 17 last?

A. Oh, possibly an hour.

Q. And who was present for the Department of Justice?

Mr. Williams: Excuse me. I would like to object to that.

A. I don't have the names with me.

Q. Was Mr. Reycraft there?

A. I don't remember the men that were there, Mr. Fortas.

Q. Did you tell the Department of Justice anything with respect to this industry?

A. I answered the questions they asked me.

Q. Now, they had sent you a letter dated August 6.

Did you at your meeting of August 17 reply to that in [fol. 180] writing?

A. I answered the questions that they asked me.

Q. In writing?

A. On August 17th I was in the Department an hour and I answered the questions that they asked me.

Q. I am asking you whether you answered them on August 17 orally or in writing?

A. Orally.

Q. Orally. And did you at any time or have you at any time submitted to the Department of Justice any written communication in connection with this matter, whether it is in the form of documents, records, replies to questions, general letters, specific letters or any other form of information?

A. Not on the 17th of August.

Q. At any time?

A. Yes.

Q. And will you state what you have submitted to the Department of Justice?

A. Oh, I wrote them a memorandum about my understanding of the industry.

Q. And do you have a copy of that with you in this courtroom?

A. This is not a courtroom.

[fol. 181] Q. In this room?

A. Yes, I do.

Q. Will you produce it, please?

Mr. Monroe: We will produce it if the Court orders us to produce it.

Mr. Fortas: We will subpoena the document.

Q. What is the date—Is this one document, Mr. Mosman?

A. Just one.

Q. And what is the date of it?

A. I think it's the 19th.

Q. It was following your conversation——

A. That's right.

Q. —and before you sent out your letter to the stockholders, which was on the 20th.

Now, Mr. Mosman, do you recall about how many pages this document contains?

A. No, I don't.

Q. And do you recall to whom it was addressed?

A. I don't remember that either.

Q. Was this prepared by you personally?

A. It was prepared in accordance with the questions that were asked me.

Q. Yes, sir. But did you prepare it personally or super-
[fol. 182] vise its preparation?

A. I wouldn't say that I did all of it, no.

Q. But you did——

A. I signed my name to it.

Q. And you did part of it? You supplied information for it?

A. Yes.

Q. And who else participated in the drafting of that, if anybody did?

A. I don't remember their names; people in the department.

Mr. Williams: I object to that.

Q. You mean that you prepared this letter in the Department of Justice?

A. I wouldn't say that either. It was in Washington.

Q. How long were you in Washington?

A. Three days.

Q. And how often did you see the Department of Justice or anybody connected with the Department of Justice in those three days?

A. Two or three times.

Mr. Williams: Object to the question.

Q. You saw them on the 17th. And did you also see
[fol. 183] them on the 18th?

A. Just for a minute.

Q. And whom did you see on the 18th?

A. I don't remember the names.

Q. And did you see them on the 19th?

A. For a short moment, yes.

Q. Now, where was the letter or memorandum, or whatever it was, typed?

A. In Washingon.

Q. Where?

A. We have a store in Washington.
Q. Where was the letter typed?
A. It was typed in Washington, sir.
Q. Yes, sir. But where?
A. Well, if you must know, it was typed in our office.
Q. In your office?
A. Yes.
Q. And you say certain officials or representatives of the Department of Justice participated in the preparation of it?
A. I gave them—I put in there the same information that we had talked about.
Q. Well, that's not quite the answer to my question. [fol. 184] Did some of them participate in any way? Did any of them dictate any parts of the letter or memorandum?
A. No.
Q. Did any of them write out in longhand anything that was later incorporated in the memorandum or letter now, Mr. Mosman?
A. I don't imagine they did. I don't know.
Q. Please remember. This is a serious inquiry, Mr. Mosman.
A. I am taking it very seriously.
Q. Yes, sir. And please see if you can recall by giving the matter a little thought. Did any of the officials, representatives, officers or lawyers connected with the Department of Justice write out in longhand, dictate, any material which was subsequently incorporated in the memorandum or letter?

Mr. Williams: Excuse me. I would like to object to further delving into this matter. I think it's clear on the record that the Department of Justice sent a letter to Mr. Mosman's company asking for information and, in response to that letter, he came to Washington and I believe—you correct me if I am wrong—accompanied by counsel.

The Witness: That's right.

[fol. 185] Mr. Williams: And that you furnished the Department information orally then, and subsequently furnished the Department of Justice information in writing.

The Witness: That's right.

Mr. Fortas: Well, I appreciate your testimony, Mr. Williams.

Mr. Williams: I object to further inquiry.

Mr. Fortas: I appreciate your testimony, but you aren't testifying here; and I want to go ahead with this witness.

Q. My question to you, Mr. Mosman, to which I have not yet had an answer, and which we intend to pursue, is: Did any official representative, officer, employee, attorney, connected with the Department of Justice, provide anything, in writing, typing, longhand or otherwise, that was incorporated in the letter or memorandum to which you are referring?

A. Can't you rephrase that thing so I can understand it better?

Q. No, sir. I will have the reporter read it back. I have rephrased it four or five times.

A. No. You said the same thing, I think, three times.

[fol. 186] Q. I think I have done the best I can do with it. You ask me any questions you want to about its meaning.

Mr. Fortas: Mr. Reporter, will you read it back?

(Pending question read by the reporter.)

Mr. Monroe: I say, if you don't know, say so.

The Witness: That's what I am trying to say, but I don't seem to be able to get it across.

Q. What is your sworn testimony here, Mr. Mosman?

A. I don't remember.

Q. Mr. Mosman, did you indicate to any representative of the Department of Justice during the days that you were in Washington your attitude towards the Department of Justice's instituting a suit with respect to this transaction?

Mr. Williams: Excuse me. Before you answer that question, Mr. Mosman, I would like to state an objection for the record; objection to further inquiry along this line of questioning.

Mr. Fortas: Are you asserting an in foro privilege? I don't understand your question.

Mr. Williams: I think it's been sufficiently covered; and it's not relevant.

Q. Will you answer the question, Mr. Mosman?

[fol. 187] The Witness: The question is?

Mr. Fortas: Will you read it back, Mr. Reporter?

(Pending question read by the reporter.)

A. I would say no. I don't know how I would convince them one way or the other.

Q. I didn't ask you whether you had convinced them. I asked you whether you told them that you were opposed to such a suit or——

A. I don't know that it was discussed.

Q. —or that you were not opposed to such a suit? Sir?

A. I don't know that it was discussed.

Q. Where did you stay in Washington?

A. Carlton.

Q. Sir.

A. Carlton.

Q. Did you have telephone conversation with representatives of the Department of Justice?

A. Not that I remember. I may have.

Q. Did any of them come to your quarters?

A. No.

Mr. Fortas: That's all.

Mr. Williams: Just one or two questions, Mr. Mosman.

[fol. 188] Redirect examination.

By Mr. Williams:

Q. In the letter that you were asked about that was submitted by you to the Department of Justice following your meeting with officials in the Department of Justice on the 17th, did that letter contain any information supplied to you by the Department of Justice, any factual information at all?

A. No.

Q. Does that letter contain information supplied only by you?

A. Yes.

Mr. Williams: I think that's all.

Mr. Fortas: I now renew my demand for the letter or memorandum to the Department of Justice which has heretofore been referred to. I have made such demand on the defendant Herring-Hall-Marvin, on the witness Warren Mosman and on the plaintiff in this action.

Mr. Monroe: On what rule?

Mr. Fortas: On the grounds that it contains information relevant to this cause of action and to the pending matter. [fol. 189] It also undoubtedly contains information which may lead to the discovery of information in this matter.

Mr. Monroe: On what rule are you basing this request?

Mr. Fortas: You know the rules. You make me look at the book.

Mr. Monroe: I want the record to show that he has the book with him.

Mr. Fortas: Well, I make the demand under Rule——

Mr. Monroe: You tell me on Monday.

Mr. Fortas:—26, 27, 28, 30, 31—no, not 31—34 and 45, and otherwise on the basis of any rules that I haven't mentioned which are relevant and which will all be cited in due time.

Mr. Williams: Off the record.

(Discussion off the record.)

Mr. Fortas: So far as I am concerned, we can excuse Mr. Mosman.

Warren Mosman.

[fol. 190] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

[Title omitted]

DEPOSITION OF RAYMOND KOONTZ—August 31, 1959

Deposition of Raymond Koontz, a witness called on behalf of the plaintiff, pursuant to notice given after application had been made to the Court under Rule 26 (a) for leave to take depositions, and order of Court, and stipulations of counsel hereinafter set forth, at 603 Dixie Terminal Building, Cincinnati, Ohio, between the hours of 10:00 o'clock A.M. and 11:30 o'clock A.M. on Monday, August 31, 1959, before Robert I. Crawford, a notary public in and for the State of Ohio.

[fol. 191] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice. Larry L. Williams, Attorney, Department of Justice and Richard H. Pennington, Assistant United States District Attorney.

For the Defendant Diebold, Incorporated: Arnold, Fortas & Porter by Abe Fortas, Esq.

For the Defendant Herring-Hall-Marvin Safe Company: Taft, Stettinius & Hollister by Murray S. Monroe, Esq.

[fol. 192] RAYMOND KOONTZ, called as a witness on behalf of the plaintiff, being by me first duly sworn, as hereinafter certified, to depose the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Direct examination.

By Mr. Toohey:

Q. Mr. Koontz, will you state your position with Diebold?
A. President and general manager.
Q. How long have you been president?
A. Since 1952.
Q. And have you been general manager that length of time also?

A. Yes.

Q. Will you describe the nature of your duties?

A. I have general responsibility for the conduct of business, executive and general responsibility.

Q. Does that include selling responsibilities, Mr. Koontz?

A. Well, I don't directly handle the sales. We have a general sales manager, and I do assist him from time to time.

Q. You handle no sales yourself, personally; is that cor-
[fol. 193] rect?

A. That would be generally correct, yes.

Q. Will you state, Mr. Koontz, whether you were associated with Diebold before 1952?

A. I have been associated since 1947.

Q. Will you describe the capacities, positions, held?

A. I was vice president and treasurer from 1947 to 1951; I believe an executive vice president from 1951 to 1952.

Q. Can you state where Diebold, Incorporated is incorporated as a corporation?

A. Ohio.

Q. Can you state the location of the principal office?

A. Canton, Ohio.

Q. Where are the manufacturing plants located?

A. Canton, Ohio; Wooster, Ohio; Dickson, Tennessee; Norwalk, Connecticut; Toronto, Canada. These are the plants of the parent corporation and its wholly owned subsidiaries.

Q. Then these plants you have, the locations of which you have described, include all the manufacturing plants owned by Diebold?

[fol. 194] A. Cleveland, Ohio. That should be all.

Q. Will you state the location of your sales offices?

A. I don't have a list of all the sales offices. We have direct sales offices located in approximately 38 locations. I couldn't name the cities offhand.

Q. Those are principal cities throughout the United States?

A. Right

Q. Will you state, Mr. Koontz, the value of the present assets of Diebold?

A. The total assets of the company, I believe, are about $13,000,000.

Mr. Fortas: On a consolidated basis?
The Witness: On a consolidated basis.

Q. Will you state, Mr. Koontz, the value of the net sales made by Diebold for the calender year 1958?

A. The consolidated sales of the company and all of its wholly owned subsidiaries was approximately $27,900,000.

Q. Your financial records and books are kept on a calendar year; is that correct, Mr. Koontz?

A. Yes.

Q. Will you identify, describe, the products made by Diebold, Incorporated?

[fol. 195] A. We are manufacturers of a rather wide line of office equipment, filing equipment, mechanical files, rotary files, filing cabinets, safes, chests, burglar alarms, fire resistive containers, fire resistive and burglar resistive equipment in general.

Q. Does your company manufacture bank vault doors?

A. Yes.

Q. Will you state the volume of sales of bank vault doors made by Diebold in the calendar year 1958?

Mr. Fortas: Now, I am reserving the right to object to that question. At yesterday's deposition Mr. Mosman did not answer the question with respect to Herring-Hall-Marvin.

I don't know whether Mr. Koontz can answer this question, but I should like now to ask counsel for the plaintiff whether they have obtained the answer to that question with respect to Herring-Hall-Marvin from Mr. Mosman or from other sources.

The reason that I make that inquiry is that figures of this sort are, of course, of a certain sensitivity in business. And I should like to be informed whether that information with respect to Herring-Hall-Marvin has been made [fol. 196] available for purposes of this proceeding?

Mr. Toohey: Mr. Fortas, the plaintiff has information relating to the question you asked, and we intend to use it. We don't intend at this time to disclose the precise nature of it nor the precise source of it.

Oh, and let me understand your question. As I understood it, Mr. Fortas, your question was whether, following the deposition on Saturday, we obtained from any source

figures relating to the dollar volume of bank vault doors, sales done by Herring-Hall-Marvin?

Mr. Fortas: Not at this moment, no. You are coming to that, and I am coming to it too. At this moment I am addressing myself to the question that you put to this witness, which is the figure as to Diebold's net sales taken in the year 1958. And my recollection—I may be in error; I don't think so—is that you yesterday asked that question of Mr. Mosman, and Mr. Mosman said he didn't have the answer.

What I am pointing out to you is that if the answer to your question is to be disclosed by Diebold—or before [fol. 197] making a judgment as to what our attitude will be with respect to the answer to that question by Diebold, I want to know whether you have that information with respect to Herring-Hall-Marvin, namely, the information as to net sales in their accounting year 1958. And I don't care when you got it at the moment, whether you got it before the deposition or after.

Mr. Monroe: I would like to ask one question. Are you asking about total net sales?

Mr. Fortas: That was the question addressed to this witness.

Mr. Monroe: Aren't those on the exhibits which have been introduced for Herring-Hall-Marvin?

Mr. Toohey: My question was directed to a single product.

Mr. Fortas: I beg your pardon, bank vault doors. And my remarks stand, but I direct them to the item of bank vault doors. Mr. Mosman said he could not answer that question.

Q. Will you answer the question, Mr. Koontz?

Mr. Fortas: Will you reply to my inquiry? I know you don't have to.

Mr. Toohey: I will say, Mr. Fortas, that we do have [fol. 198] information relating to bank vault doors. We reserve the information at this time.

Mr. Fortas: You mean you are not going to tell me what that information is?

Mr. Toohey: It's information relating to the sales of bank vault doors.

Mr. Fortas: You are not going to tell us the figure?

Mr. Toohey: No.

Mr. Fortas: You didn't press Mr. Mosman on the question at the deposition here on Saturday.

Q. Mr. Koontz, can you answer that question?

A. I could answer it approximately, yes.

Q. Will you then give us an approximate statement of the sales of Diebold bank vault doors for the calendar year 1958?

Mr. Fortas: I object to the question for the reasons previously stated. I do not instruct the witness not to answer, but I reserve my objection.

Go ahead and answer.

A. The total number was approximately 346, and the value was approximately $2,400,000, this being a very unusual year in that business.

Mr. Fortas: By unusual, good?

Q. You mean unusually good or——

[fol. 199] A. Unusually high.

Q. Will you state the range of prices for your line of bank vault doors? I am not asking for an average price, Mr. Koontz.

A. No. The starting prices would be somewhere around 3,000 to 3500 dollars, and they could run 25,000, 35,000 dollars, the high being most exceptional.

Q. Who are your customers for bank vault doors, Mr. Koontz?

A. Customers include commercial institutions, financial institutions of all kinds, insurance companies, savings and loans, banks, United States—Federal Government, states and municipalities.

Q. I wonder, Mr. Koontz, if you would describe a little more the commercial institutions which purchase bank vault doors from you, the nature of them?

A. Well, they may be jewelers, manufacturers of precision instruments, dealers in precious metals, people with perhaps blueprints and drawings that are held secret. It's wide varieties.

Q. I believe you mentioned that your company manu-

factured bank vault linings. Am I correct, Mr. Koontz?

A. I don't recall mentioning that, but we do.

[fol. 200] Q. You do. To whom do you sell bank vault linings?

A. Insurance companies—Financial institutions primarily; insurance companies, savings and loans, banks.

Q. Can you give me an estimate, and will you give me an estimate, of the number of linings sold for the calendar year 1958?

A. I couldn't, not in numbers.

Q. Can you and will you give me the dollar volume of bank vault linings sold in the calendar year 1958?

A. My best recollection is that it was something less than $800,000.

Mr. Fortas: Excuse me. I move to strike the question and answer unless counsel will rephrase it to eliminate the word "bank" in view of the witness' testimony, or to explain that that term is used as a figure of speech.

A. (Continued.) Yes. May I say that my answer on that basis is incorrect; that the bulk of those linings were sold to others than banks.

Q. Will you give us the estimate of the sales made by Diebold of safe deposit boxes for the calendar year 1958?

A. That figure I do not have.

Q. Do you make safe deposit boxes, Mr. Koontz?

[fol. 201] A. Yes.

Q. Can you estimate the number of safe deposit boxes sold by Diebold in 1958?

A. I couldn't.

Q. Does your company make security and collateral lockers?

A. Yes.

Q. Is that, Mr. Koontz, the same item as a security and collateral chest?

A. I am not familiar with the term "security and collateral chest." In our nomenclature there is a large difference between security lockers and chest.

Q. I see. Would you explain that difference?

A. Well, chests are primarily for the storage of money. Lockers may be used for both. They may be used for collaterals and records, as well as money.

Q. Is there any difference in the size and construction?

A. Yes.

Q. Would you describe it briefly?

A. Well, I would describe a locker as being basically a steel box with a combination or security lock of some kind on it; whereas a chest is built to stand burglar attack, either [fol. 202] by torch or by drills or other means, and with heavier, much thicker walls.

Q. Do you know, Mr. Koontz, whether the security and collateral lockers are customarily put inside a bank vault for safekeeping?

A. They are put inside bank vaults.

Q. Is that how they are customarily used by users of the lockers?

A. Well, they are customarily used my whoever buys them, insurance companies or savings and loans, banks; and they are very often put in vaults.

Q. Does your company make trust department lockers?

A. Yes.

Q. Will you state the dollar sales of trust depantment lockers made by Diebold in 1958?

A. I could not state that. I don't know it.

Q. Will you state the approximate number of units of trust department lockers sold by Diebold in 1958?

A. I would not have that information.

Q. Does your company make drive-in windows?

A. Yes.

Q. Will you state the dollar sales of drive-in windows made by Diebold in 1958?

A. I am not in a position to give that information.

[fol. 203] Q. Will you state the approximate number of units of drive-in windows sold by Diebold?

A. I am not in possession of that information either.

Q. Does your company make night depositories?

A. Yes.

Q. Will you state the approximate dollar sales by Diebold in 1958?

A. I don't have a breakdown of any of these products.

Q. Neither in units nor in dollars?

A. Nor in dollar volumes.

Mr. Fortas: I should like to state for the record that Mr. Koontz was advised by counsel that he would very

likely be asked the question which was asked Mr. Mosman, which was only with respect to vault doors, so that he informed himself of that to be prepared to testify.

The other questions that you have just asked him were not asked of Mr. Mosman and he was, therefore, not asked to prepare himself on that.

Q. Mr. Koontz, does your company make fire resistive safes?

A. Yes.

[fol. 204] Q. Does your company make fire resistive money safes?

A. Yes.

Q. Does your company make fire resistive vault doors?

A. Yes.

Q. Will you describe, Mr. Koontz, the difference, if any, between a bank vault door and a fire resistive vault door, as these terms are used in the industry?

A. Of course, I am a little bit confused by your term of "bank vaults." I don't know what a bank vault is. A vault is a vault.

A vault primarily is a strong room, and there is no difference in a vault used for a bank or a vault used for any other purposes. And a fire resistive vault door might be used for a bank.

And the primary difference, I would say, is that the conventional bank vault doors do not have primary fire insulation in them. They are sold primarily for burglar or unauthorized entry; whereas a fire resistive vault door has security from unauthorized entry in that it has locks, combination locks and double locks perhaps, but it is also insulated against fire, penetration of fire into the vault.

Q. Is there anything about one or the other door which [fol. 205] would distinguish one from the other?

Mr. Fortas: You mean in addition to——

The Witness: I just described——

Q. In addition to what you have described.

A. There might be differences in styling, design and appearance. Bank—Fire resistive vault doors are sometimes, many times, equipped with the same—with a locking system similar to vault doors, and sometimes the appearance is very similar.

Q. Does a fire resistive vault door have in the innermost part of its structure a steel plate?

A. It might or it might not.

Q. And can you tell me, Mr. Koontz, the range of width of that steel plate which is sometimes found in bank vault doors, as you have described?

Mr. Fortas: Vault doors.

Q. I amend that. Fire resistive vault doors.

A. I could not. I don't know the width of those plates.

Q. And in your knowledge do you have any idea whether the same width of this steel plate we are describing is used both in the bank vault door and the fire resistive vault door?

A. As I said before, in some cases it might be. In the [fol. 206] average case it would be smaller.

Q. In the average case it would be smaller——

A. Would be smaller.

Q. —in the case of fire resistive vault doors?

A. In the case of fire resistive vault doors.

Q. Thank you, Mr. Koontz. Does your company make fire resistive filing cabinets?

A. No.

Q. Does your company sell fire resistive filing cabinets?

A. Yes.

Q. From whom do you purchase the filing cabinets yourself?

A. Remington Rand Division of Sperry Rand Corporation.

Q. Does your company make bank teller counter equipment?

A. No.

Q. Does your company sell bank teller counter equipment?

A. No.

Q. Does your company make lobby depositories?

A. No.

Q. Does your company sell lobby depositories?

[fol. 207] A. No.

Q. Mr. Koontz, will you describe for us, for information, the difference, if any, between a night depository and a lobby depository?

A. A lobby depository, as its name suggests, is usually

a strongbox with a depository slot in it which is installed in a lobby for rush hour purposes or other purposes.

A night depository is a slot entering a strongbox which is usually on the outside wall of a building, used for after hour deposits, after the bank is closed.

Q. Thank you, Mr. Koontz. Does your company make burglar alarms?

A. Yes.

Q. Are these burglar alarms sold to banks?

A. They are sold to banks, yes.

Q. Do you sell your burglar alarms to any other customers, Mr. Koontz?

A. Other customers than banks?

Q. Other than banks.

A. Oh, yes. We sell them to a wide range of commercial customers; savings and loan institutions, insurance companies, places like jewelers and any persons—fraternal organizations, anyone holding valuables or wanting premises protected at night or after closing hours.

[fol. 208] Q. Is there any difference, Mr. Koontz, between the burglar alarms your company sells to banks and the burglar alarms your company——

A. None.

Q. —sell to customers other than banks?

A. None.

Q. Does your company make fire resistive boxes, Mr. Koontz? Fire resistive boxes.

A. I don't know the term. We don't, no. I would say no.

Q. Does your company make money chests?

A. Yes.

Q. Will you describe the customers who purchase money chests made by Diebold?

A. Well, everybody having money in quantities; merchandise establishments, variety stores, supermarkets, filling stations. Some small part might be purchased by banks, savings and loan institutions.

Q. Does your company make rotary files?

A. Yes.

Q. To whom do you sell rotary files?

A. Well, again, we sell them to almost everybody: the Federal Government, states, municipalities, insurance companies, public utilities, some small portions of banks,

[fol. 209] department stores, commercial establishments of all kinds.

Q. Mr. Koontz, you are familiar with the distribution system of your company?

A. Yes.

Q. Will you describe it generally, Mr. Koontz?

A. As I mentioned before, we have approximately—I think the figure is around 38 direct sales offices. We have regional managers at various key points. We have salesmen calling directly on the customers out of those offices.

In addition to that, we have a dealer sales organization in which we sell through dealers, office equipment dealers, in towns in which we do not have direct selling offices.

Q. Mr. Koontz, will you describe the products made and sold by your company by this direct sale method of distribution?

A. Well, the list of products which I have previously given you.

Q. All of them?

A. All of them, yes.

Q. Will you enumerate the products made and sold by your company through the dealer sales organization you have described?

A. Safes, money chests, filing cabinets, including fire [fol. 210] resistive filing cabinets; rotary files, printing loose-leaf forms, visible book systems.

Q. It's my recollection you mentioned that your company sold visible book records, various items of office furniture and so forth——

A. (Nodding.)

Q. —through your dealer distribution system. I take it there are a number of items sold through your dealer system which are not sold directly by your company to customers?

A. Do I understand your question? Would you state it again, please?

Q. Yes. Are there some products made and sold by your company which are sold directly which are not also sold through your dealer system?

A. Yes.

Q. Will you state what those products are?

A. Safety deposit boxes, drive-up counters, vault doors, burglar alarm systems.

Q. Mr. Koontz, for my own information, when you use the term "vault doors," you include what you have called conventional vault doors as well as fire resistive vault doors?

A. Fire resistive vault doors are also sold through [fol. 211] dealers. Conventional vault doors are not sold through dealers.

Q. Thank you, Mr. Koontz. Mr. Koontz, do you have in your possession or will you describe where information relating to the amount of sales in units of products sold by your company for the calendar year 1958 is contained or is available?

Mr. Fortas: May I ask that you rephrase that question?

Q. Yes. Will you state, Mr. Koontz, whether you have in your possession or whether you know where information relating to the breakdown of sales by Diebold of these products we have been going over for the year 1958 is held or contained?

A. First you asked me if I have any in my possession?

Q. Right.

A. I do not. Secondly, where such information is available. It's available at our general offices in Canton.

Q. Is it available in the breakdown I suggested by products?

A. Yes.

Q. Thank you, Mr. Koontz. Mr. Koontz, will you describe the geographical areas where you sell your products through [fol. 212] the direct sales method?

A. We sell them in the principal largest cities in the United States.

Q. Throughout the United States?

A. Throughout the United States.

Q. Will you describe the geographical areas where you sell your products through your dealer distribution system?

A. In the small cities, in the nondirect representative cities throughout the United States.

Q. Does your company have exclusive contracts with the dealers?

Mr. Fortas: Just a moment. I want to object to that question. It's far beyond the scope of the issues of this complaint. I direct you not to answer.

Q. Mr. Koontz, I understand you have been associated with Diebold since 1947. Has it been your custom during those years to attend industry conventions?

A. I have attended a number of such conventions.

Q. Would such conventions include bankers' conventions?

A. Yes.

Q. Does your company display in any way, in physical [fol. 213] form or through brochures, advertising literature, the products it sells at the bankers' conventions?

A. Yes.

Q. Have you observed yourself, Mr. Koontz, at the bankers' conventions the similar displaying, advertising, by Herring-Hall-Marvin Safe Company and Mosler Safe Company?

A. I have observed their displays at conventions.

Q. At the same conventions where Diebold has displayed and advertised its products?

A. In some cases yes; in some cases no.

Q. Does your company advertise in trade journals, publications, magazines?

Mr. Fortas: Excuse me. Your previous questions were limited to bank conventions?

Mr. Toohey: That's correct, Mr. Fortas.

Mr. Fortas: That's all you are inquiring about at this time?

Mr. Toohey: At that time.

Mr. Fortas: I am sorry. May the question be read back?

(Last question read by the reporter.)

A. Yes.

Q. Are you familiar with the publications in which your company advertises, Mr. Koontz?

[fol. 214] A. Generally.

Q. Have you yourself observed advertisements by Herring-Hall-Marvin Safe Company and Mosler in the same publications?

A. Along with a great many others, yes.

Q. Mr. Koontz, does your company provide any service to customers for products which they have purchased from you?

A. Yes.

Q. Will you describe the nature of that service?

A. I don't know exactly what you mean by the nature of the service. We operate a service division of our company which has—We maintain service shops at key points throughout the country. We have mechanics in these shops that render service on all makes of equipment, any equipment that is sold for burglar or fire resistive purposes, and on filing equipment, mechanical filing equipment, both of our make and other makes.

We enter into some general service contracts, and we render a service on any kind of breakdown, all makes and styles of equipment, fire resistive, burglar resistive and mechanical filing field and burglar alarm field.

Q. With reference to the service contracts that your company enters into with the customers, what is the dura-
[fol. 215] tion of those contracts? How long do they run?

A. To the best of my recollection, they run for 12-month periods.

Q. What type of service is provided under those contracts?

A. Well, it's a rather wide range of service. It includes everything from polishing up, wiping, cleaning up the vaults, adjustments, maintenance of the time lock services, burglar alarm services, replacing locks, damaged locks.

Q. Can you say whether your service contracts which we have ben describing, talking about, are generally for the maintenance and service of one particular item?

A. No, could not. They are for a wide variety of items.

Q. Do you have more service contracts connected with the maintenance and service of vault doors than you do for other products?

A. No.

Q. Does your company make combination and time locks?

A. Yes.

Q. Does your company make any other kind of locks?

A. We make safe deposit locks, combination locks and
[fol. 216] time locks.

Q. Do you purchase any locks from any other company for resale to your customers?

A. Yes.

Q. Will you state what locks those are?

A. We purchase combination locks, safe deposit locks, time locks and key locks.

Q. Will you state generally the relative percentage of locks purchased by you of the total number of locks that your company sells?

A. I could only give you an estimate. I don't——

Q. That would be satisfactory.

A. The estimate that I would give would be that the purchase percentage would be about 25 percent.

Q. Thank you, Mr. Koontz. Will you state from whom you purchase combination and time locks?

A. Sargent Greenleaf, Yale and Towne—I believe there is another supplier, but I can't think of his name. These locks are purchased in most cases because of customer specifications.

Q. Mr. Koontz, in selling products into which are incorporated these combination time locks, do you generally sell the Diebold-made locks unless the customer specifies otherwise?

[fol. 217] A. Yes.

Q. Is it a fair statement that unless the customer specifies other locks, you will sell a Diebold lock?

A. Yes.

Q. Mr. Koontz, does your company install for your customers any of the products it sells to them?

A. We install some of the products, yes.

Q. Will you state what those products are?

A. We usually install safety deposit boxes, lockers, vault doors, night depositories. We might in some cases install other products. We might not.

Q. Will you describe the nature of installation of a locker, if you are familiar with it?

A. The nature of the installation would be primarily to set it in place, line it up, in many cases attach it to the walls.

Q. Mr. Koontz, to your knowledge has Diebold acquired any other companies in the past twelve years?

Mr. Fortas: I object as immaterial, beyond the scope of this complaint in these proceedings. I note that for the record. You may answer.

A. Twelve years would be what?

Q. Back to '47, I believe.

A. Yes.

[fol. 218] Q. Will you name those companies?

A. I will name them to the best of my recollection. The Record Files Company——

Q. Excuse me, Mr. Koontz. Would you also give the year of acquisition as you name the company, if you can?

A. I will. I can't tell you how good my memory would be on that. We acquired the Record Files Company at Wooster, Ohio approximately 1956; the Herring-Hall-Marvin Company of Canada in approximately 1957 or 1958; the Guardian Burglarproof Equipment Company of Cleveland, Ohio in 1958; the K. T. Cline Shelving and Locker Company in Dickson, Tennessee in 1957, approximately.

To the best of my recollection, those are the acquisitions.

Q. I am not pressing you on it. This is just to clear it. I think you named five companies.

A. Cline, Herring-Hall-Marvin of Canada, Guardian, Record Files—Did I say five or four?

Mr. Fortas: I thought there were four. I may be wrong.

Q. To the best of your knowledge, those are the only companies acquired by Diebold since 1947?

A. Yes.

Q. Will you state, Mr. Koontz, what the Record Files [fol. 219] Company manufactured?

A. It manufactures steel storage files.

Q. Presently manufacturers steel storage files?

A. Yes. It did and presently does, steel storage files and open shelf filing equipment.

Q. Did Diebold make steel storage files and the other product you mentioned at the time Record Files Company was acquired?

A. Yes.

Q. Do you know how many manufacturing plants the Record Files Manufacturing Company had when it was acquired in 1956 by Diebold?

A. One, in Wooster, Ohio.

Q. Can you state what the Guardian Burglar Company made in 1958 when it was acquired by Diebold?

A. It made and does make—it makes exactly the same thing now as it made then—safes—or money chests, night depositories, and reconditions second-hand protective equipment.

Q. Will you state how many manufacturing plants it had prior to its acquisition in 1958 by Diebold?

A. It had one in Cleveland, Ohio.

Q. Will you state whether Diebold also made money chests, night depositories and the other products as having [fol. 220] been made by Guardian Burglar in 1958?

A. Yes.

Q. Will you describe the products made by Cline at the time of its acquisition by Diebold?

A. It made then and makes now lockers—that is, not security lockers—washroom lockers, club lockers, school lockers, shelving, market shelving, tool crib shelving, related lines.

Q. Did Diebold——

Mr. Fortas: Mr. Toohey, just a minute.

Mr. Toohey: Yes.

Mr. Fortas: I assume that it may be understood that my objection stands to this line of questioning?

Mr. Toohey: It is understood, Mr. Fortas.

Q. Mr. Koontz, did Diebold manufacture any of the products also made by Cline at the time of its acquisition of Cline?

A. No.

Q. Will you state the products made by Herring-Hall-Marvin of Canada at the time of its acquisition by Diebold?

A. Safe deposit boxes, light vault doors——

Q. I didn't understand.

[fol. 221] A. Light, small——

Q. Light, small.

A. —low gauge, light gauge, inexpensive vault doors and money chests. I believe that would be the line.

Q. Did Diebold also make those products which you have described as having been made by Herring-Hall-Marvin at the time of its acquisition of Herring-Hall-Marvin of Canada in 1957?

A. It did not make them in Canada and it did not make the type and quality of equipment made there anywhere.

Q. When you say "type"——

A. An inexpensive, what might be called a low quality line.

Q. Mr. Koontz, do you recall the total volume of business done by each of these companies at the time of their acquisition by Diebold?

Mr. Fortas: I am going to object to that and instruct the witness not to answer. I doubt if he knows the answer to it anyway. I indulged you in getting the other information as part of your discovery, but it is clearly irrelevant and outside the scope of this complaint; and I instruct the witness not to answer.

Q. Can you answer that question, Mr. Koontz?

[fol. 222] Mr. Fortas: I instruct the witness not to answer that question too.

Q. Mr. Koontz, is you company presently manufacturing products to the limits of its productive capacity?

A. Yes.

Q. Mr. Koontz, will you state what plans your company has for the future conduct of the Herring-Hall-Marvin operations and plants if the acquisition is consummated?

A. Well, it's really a broad question. I don't know how to go about answering. This, of course, was all discussed in complete detail repeatedly and at great length with Mr. Mosman, who is thoroughly, thoroughly familiar with those plans.

We plan to operate the Herring-Hall-Marvin Company or activity either as a separate corporate entity or as a division—that has not been fully determined—and to continue its operation as a company under its name exactly as it has been conducted in the past.

We planned to—In our factories in Canton, Ohio we are tremendously—badly crowded, and the growth of our business is restricted by that fact; and we planned to move all of the safe manufacture of our plant in Canton into this plant here, thereby greatly enlarging the scope of its activity.

[fol. 223] Mr. Fortas: Into the Herring-Hall-Marvin plant.
The Witness: Into the Herring-Hall-Marvin plant.

A. (Continued.) We planned to take certain products which are manufactured in the Herring-Hall-Marvin plant —among others, the insulated containers, the security files, point-of-use containers, insulated file cabinets, the bank teller's equipment—and sell those under parallel labels; sell them under the Diebold label as well as under the Herring-Hall-Marvin label; thereby, at least in hoped for, to greatly increase the volume of those sales.

The primary purpose here was to become more competitive. We were competing with relative giants in our field in the Remington Rand Company and the Mosler Safe Company. We don't have as complete a line of products as offered by those companies. And also the Shaw Walker Company is a much bigger company than ours.

The Herring-Hall-Marvin Company does not have the distribution system to compete effectively with some of these relative giants, and they are financially weak.

We felt that the combination of the system that we have, the broader distribution system here, and the strength and other factors that we could throw in here would serve [fol. 224] to make us more competitive with the larger factories in this field.

In short, we intended—intend to expand the manufacturing facility here and to maintain the name and distribution system exactly as it has been in the past.

We have made an employment agreement and arrangements with Mr. Mosman to conduct that activity.

Q. Thank you, Mr. Koontz. Mr. Koontz, to your knowledge does Remington Rand make vault doors?

A. No.

Q. Do they make either what you call the conventional vault door or the fire resistive vault door?

A. They do not. I do not believe they do.

Q. Do they make money chests?

A. Yes.

Q. Do they make safe deposit boxes?

A. They make a wide line of fire resistive equipment, point-of-use containers, insulated files and related equipment.

Q. Excuse me, Mr. Koontz. I rudely was listening and

talking. Your were mentioning some of the products that Remington Rand made along the lines of fire resistive equipment. Did you or did you not say whether or not Remington Rand makes security and collateral lockers?

[fol. 225] A. I don't know.

Q. Do you know whether they make trust department lockers?

A. I believe that they do.

Q. Do you know whether they make drive-in banking windows?

A. They do.

Q. Do you know whether they make bank teller counter equipment?

A. They do.

Q. Mr. Koontz, would you describe for our information what is included in this term "bank teller counter equipment"?

A. Well, I would describe it generally as being all the equipment back of the counter used by the teller for the handling of cash and records.

In general, it includes filing equipment, drawers, money—compartmented counters and drawers for the handling of money and, in general, all the equipment used in a bank counter by the teller. Remington Rand is a very large factor in that business.

Q. Is your company a large factor in that business, Mr. Koontz?

A. We do not make it at all.

[fol. 226] Q. Mr. Koontz, do you consider your company in competition with Herring-Hall-Marvin?

Mr. Fortas: Well, I object to that as calling for a legal conclusion. Don't answer that.

Q. I ask you as a businessman, Mr. Koontz, who have been employed by Diebold since 1947 and familiar with the sales operation of your company, whether in your opinion you consider that you compete in the sale of Diebold products against Herring-Hall-Marvin.

Mr. Fortas: May I have the last of that read back?

(Last question read back by the reporter.)

Mr. Fortas: I will object to the form of the question and instruct the witness not to answer. I have no objection to the question being rephrased.

If you are asking the witness whether there are certain products that they sell which Herring-Hall-Marvin also sells and which are available to the same types of customers, I would not object to it; but when you phrase it so as to ask for a legal conclusion, I do object to it.

I want to add to the record further, that you are asking for an opinion, an opinion which is totally irrelevant. The [fol. 227] only thing that is relevant is a question of fact.

Q. Mr. Koontz, has your company to your knowledge made any studies in recent years of your company's relative position in the sale of the products it manufactures and sells?

A. I have no knowledge of such studies.

Q. Mr. Koontz, do you consider your company to be an effective competitor?

Mr. Fortas: Well, object to the form of the question. It's not capable of a responsive answer.

Q. Mr. Koontz, do you know whether any companies have commenced the manufacture and sale of vault doors in the United States in recent years?

A. I believe that they have, yes.

Q. Will you state the names of those companies?

A. The Herman Safe Company in San Francisco has definitely begun the manufacture of such doors and, among other things, recently completed delivery of 18 such doors to the Bank of America in San Francisco, and has other such doors under manufacture at the present time.

The Peco Company of Minneapolis advertises the manufacture of vault doors. I have been in their plant and I have seen bank vault doors under construction there.

And then there has been, of course, the entry into the [fol. 228] market of the Chubb Safe Company of England, and they have appointed or have been acting—had the Smith-Wheelock Company of Toledo, Ohio acting as their agent, who have been advertising their bank vault doors in this country.

Mr. Fortas: For the record, may I ask whether Peco is a contraction of Protective Equipment Company?

The Witness: That is correct.

Q. Mr. Koontz, may I ask the source of your information with relation to the production of doors by the Herman Safe Company?

A. Employees of our company who have witnessed such production.

Q. Does the Chubb Company of England have any manufacturing plants in the United States to your knowledge?

A. They have manufacturing facilities in Canada, but I do not think they have any in the United States.

I would also like to state in answer to the question that you asked be about the Herman Safe Company that my sources were double, in that employees of our company have been in the factory, witnessed, and Mr. Mosman told me specifically that the Herman Safe Company was manufacturing vault doors and told me the orders on which they manufactured these vault doors.

[fol. 229] Mr. Toohey: Thank you, Mr. Koontz. I have no further questions, Mr. Fortas.

Mr. Fortas: Mr. Monroe.

Cross-examination.

By Mr. Monroe:

Q. Mr. Koontz, does Diebold own any stock in Herring-Hall-Marvin?

A. Yes.

Q. Do you know haw many shares?

A. I think it is 37.

Q. Did you know that Herring-Hall-Marvin had a shareholders' meeting, I believe it was on Friday?

A. I knew that they had called such meeting.

Q. Did you or anybody under your authorization execute a proxy for that meeting?

A. I believe our company executed a proxy for that meeting.

Q. Do you know who that proxy was executed to?

A. No, I do not.

Q. Would it be to Mr. Holland's office, someone from his office?

A. Probably was.

Q. Did you authorize your proxies to propose a motion at that meeting?

[fol. 230] Mr. Fortas: May the record show that the reference to Mr. Holland is a reference to the law office of Mr. Jesse Holland, which is counsel for Diebold in this respect.

Mr. Monroe: Thank you.

The Witness: Will you restate the question?

Mr. Monroe: Could you read it to him?

(Last question read by the reporter.)

Mr. Jesse Holland: Off the record a minute.

(Discussion off the record.)

Mr. Jesse Holland: I can make the statement for the record that the Diebold Company executed and delivered to Thomas Crandall, associate of mine, a proxy in his name designating him, with power of substitution, to act as the proxy for the Diebold Company and to take any and all action at the meeting that Diebold would be authorized or empowered to take had they been personally present by an officer.

Mr. Crandall executed a substitution to a Mr. Lester Rosen, another associate of mine, in respect of a few numbered shares. Both individuals attended the meeting as proxies for the Diebold Company. And at that meeting [fol. 231] one of the proxies, I believe Mr. Crandall, read a statement into the record which became part of the minutes.

I also believe that—or so I am informed. I have not been in direct communication—I have been in telephonic communication with Mr. Crandall, who informed me that at that meeting he likewise moved the adoption by the shareholders of resolution authorizing and approving the contract, that that motion was seconded my Mr. Rosen, also a proxy; that a vote was taken and the vote was 5——

Mr. Monroe: 5298, I believe.

Mr. Holland:—5298 against, I believe and 37 or 38 for; and that then the meeting was recessed. A motion was

made for a recess, which Mr. Crandall and Mr. Rosen as proxies voted no. and 52 hundred and some odd shares voted for, and the meeting was recessed.

Mr. Monroe: My understanding is that this action in the form of the motion made by Mr. Crandall was done with the authorization of Diebold?

Mr. Holland: I think the legal conclusion is that if I give somebody a proxy to act in my behalf with full discretion. I should suppose that I would be responsible for his conduct.

[fol. 232] Mr. Monroe: Let me rephrase the question.

I will address this to Mr. Koontz.

Q. Mr. Koontz, prior to the meeting did you know that this motion or that this type of motion was going to be made by your proxies?

A. I did not.

[fol. 233] Q. Mr. Koontz, you know that the District Court of the Southern District of Ohio issued a restraining order against Herring-Hall-Marvin in this matter last Monday?

Mr. Fortas: Mr. Monroe, would you state the relevance of this to the subject matter of these depositions so that I may make a judgment as to whether I will permit the witness to answer.

Mr. Monroe: I think it is relevant in this sense. that you know a restraining order was issued.

Mr. Fortas: Against Herring-Hall-Marvin.

Mr. Monroe: That's right.

Mr. Fortas: Alone.

Mr. Monroe: Not against Diebold.

Mr. Fortas: That's correct.

Mr. Monroe: There was apparently an effort made at this meeting to get Herring-Hall-Marvin to go through with the contract. It seems to me that raises some question as to if there wasn't an attempt to induce Mr. Mosman to violate the restraining order.

Mr. Fortas: Is that the relevance of this?

Mr. Monroe: That is what I am driving at. I think you can follow the relevancy from there.

Mr. Fortas: No, I cannot readily, but I will permit the [fol. 234] witness to answer, anyway, subject to my objection.

The Witness: You will have to read the question.

(Question read by the reporter.)

A. I am so informed.

Q. Wasn't a copy of that order served on you, Mr. Koontz?

A. I don't think so.

Q. You did know that Mr. Mosman was an officer of Herring-Hall-Marvin?

A. Yes.

Q. Did you not receive a letter from the Department of Justice around August 8th in reference to the acquisition of Herring-Hall-Marvin by Diebold?

A. I believe there was a letter later than that, that we received such a letter.

Q. Did you answer such a letter, Mr. Koontz?

A. Pardon?

Q. Did Diebold answer that letter?

A. It answered—it did not answer it by written form. It answered it by its counsel making a personal call.

Mr. Monroe: That's all.

Mr. Fortas: I have a few questions.

Cross-sxamination.

[fol. 235] By Mr. Fortas:

Q. You were aware, Mr. Koontz, were you not, prior to the stockholders' meeting of August 28th, sometime prior thereto, that Mr. Mosman owned approximately —owned or held approximately 88 percent of the stock of Herring-Hall-Marvin?

A. Yes.

Q. You were aware that he had the power, as a result of those holdings, to control whatever was done at a stockholders' meeting by voting the stock that he owned or held?

A. Yes.

Mr. Fortas: That's all.

Raymond Koontz.

[fol. 236] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

ORDER GRANTING MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND DENYING MOTION FOR PRELIMIARY INJUNCTION—Filed September 4, 1959

Whereas, the plaintiff herein, on August 24, 1959, made application to this Court, ex parte, for a temporary restraining order enjoining the defendant Herring-Hall-Marvin Safe Company from taking any steps to consummate a certain Agreement of Purchase and Sale, dated July 17, 1959, between Herring-Hall-Marvin Safe Company, as the seller, and Diebold, Incorporated, as the purchaser, pending a hearing on plaintiff's motion for preliminary injunction for the relief aforesaid; and

Whereas, the plaintiff, in support of its application for said temporary restraining order, submitted to this Court the verified complaint herein and the affidavit of one of its counsel; and

Whereas, it then having appeared to the Court that plaintiff had presented, *prima facie*, facts sufficient to warrant the granting of said temporary restraining order, ex *parte;* and

Whereas, the defendant Diebold, Incorporated having moved, on the basis of affidavits and on notice to the plaintiff and to the defendant Herring-Hall-Marvin Safe Company, to dissolve said temporary restraining order; and

Whereas, this Court, having received evidence and argu-[fol. 237] ment of counsel for each of the parties on the motion for preliminary injunction:

Now, therefore, it is hereby ordered, adjudged and decreed that:

1. The motion of Diebold, Incorporated to dissolve the temporary restraining order heretofore entered herein be,

and the same is hereby granted in all respects, and said temporary restraining order is hereby dissolved.

2. Plaintiff's motion for preliminary injunction is hereby denied in all respects.

John H. Druffel, United States District Judge.

Dated: September —, 1959

Approved as to form:

Larry L. Williams, Counsel for Plaintiff. Taft, Stettinius, & Hollister, by Murray S. Monroe, Counsel for Defendant, Herring-Hall-Marvin Safe Company. Frederick A. Reister, Abe Fortess, Counsel for Defendant, Diebold, Incorporated.

[fol. 238] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Transcript of Proceedings of Sept. 2, 1959

(Hearing on Plaintiff's Motion for Preliminary Injunction and Defendant Diebold's Motion to Dissolve Temporary Restraining Order.)

Be it remembered that on Wednesday, September 2, 1959, at 10:00 o'clock A.M., the above-styled action came on for further hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division.

[fol. 239] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice and Larry L. Williams, Attorney, Department of Justice and Richard H. Pennington, Assistant United States Attorney.

For the Defendant Diebold, Incorporated: Arnold Fortas & Porter by Abe Fortas, Esq., Victor H. Kramer, Esq., and William L. McGovern and Milliken, Reister, Fitton & Latimer by Frederick A. Reister, Esq.

For the Defendant Herring-Hall-Marvin Safe Company: Taft, Stettinius & Hollister by Murray S. Monroe, Esq.

[fol. 240] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Yesterday when we left, Mr. Fortas read a rule requiring the plaintiff here to go forward with the facts. Will you read the last paragraph of that?

Mr. Fortas: Yes. It's all one paragraph. Does your Honor want me to read the last sentence of it? I think that's the one that attracted your Honor's attention.

The Court: Yes.

Mr. Fortas: "In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion

comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order."

The Court: Well, I went over all the affidavits and the pleadings yesterday and last night, and I know a little more about it this morning than I did yesterday.

Now, at this point I want the record to show that in the opinion of the Court that the plaintiff has established a prima facie case which brought about the temporary restraining order; but at this point the burden now is on the plaintiff to proceed with their facts to justify the retention of the injunction.

[fol. 241] You may proceed.

Mr. Williams: Thank you, your Honor.

May it please the Court, I would like to take about ten minutes, if I may, to discuss briefly the law and the obligation on the Government as I understand it in this matter.

The Court: I think we are well up on that.

Mr. Williams: I would appreciate it if your Honor would allow me that much time.

The Court: All right; go ahead.

ARGUMENT BY MR. WILLIAMS

Mr. Williams: The Government's motion for a preliminary injunction in this matter is based upon Section 15 of the Clayton Act. That Act provides the District Court with broad power. I would like to quote a portion of that Act.

It says first, of course, that the respective Federal judges have power to prevent and restrain violations of the Act; and then it goes on to say, and I quote: "and pending such petition and before final decree, the court may at any time make temporary restraining order or prohibition that shall be deemed just in the premises."

As your Honor knows, the purpose of a preliminary injunction is to preserve the status quo until trial can be had on the merits.

In this instance, as I view it, the status quo at the time [fol. 242] of the suit was the existence of a contract which had been executed but not consummated. The purpose of the suit is to preserve—prevent the consummation of

that contract because the Government contends it violates the Antitrust Laws.

The Government contends, your Honor, that if you do not prevent the consummation of the contract, the Government will be irreparably injured in this respect; the Court will be powerless to render effective relief. In other words, if the contract is permitted to go through, the competition existing between the two companies will have been destroyed; and it is extremely difficult, if not impossible, for a court to reconstruct to a prior status that which has been destroyed.

We have no assurance—I would like to change that to this, your Honor, that the defendant Diebold, without a restraining order by this Court, has the power as it sees fit to commingle assets, to obtain trade secrets and, if it chooses, to close down the plant. In other words, it has the power, unless prevented by this Court, to change the status of the Herring-Hall-Marvin Company to such an extent it would be difficult, if not impossible, for your Honor to restore competition.

On the other hand, it does not appear to the Government that Diebold could be seriously injured because the [fol. 243] contract had not been consummated. It had spent no money in exchange for property or assets. If it feels that there is a valuable contract involved, assuming the Government prevails on the merits, then what value they obtain from the contract will be ill-gotten gains in that they will have realized profits as a result of a violation of the Antitrust Laws. And in all probability, if the Government prevails, the Court would find and should find that it would be necessary for Diebold to dispose of its unlawfully acquired assets and property.

Your Honor, it seems to me the case most in point in this proceeding is the case of Hamilton Watch Company vs. Benrus Watch.

The Court: I have it right here.

Mr. Williams: We cited that case in our brief, your Honor. The case arose out of an attempt by Benrus Watch Company to acquire sufficient stock of the Hamilton Watch Company to control its operation. The defendant Hamilton Watch Company brought suit to enjoin further acquisition of stock and the use of that stock to control Hamilton.

At page 740 the Court sets forth the burden upon the

party seeking a preliminary injunction. I would be pleased to read that to you, your Honor. If you do not desire me to do so——

The Court: I have just finished reading it. Here is [fol. 244] what I would like to know:

You do agree that you have to follow the rules?

Mr. Williams: Yes, sir.

The Court: And the rule here now is that the burden is on you to meet the challenge of the defendant Diebold in moving to dissolve the injunction. Now it's time for you to come up with the facts in accordance with the rules.

Mr. Williams: Your Honor, we feel that we have met our burden in the documents we have presented to you and the additional references to depositions of the parties which have been furnished—filed with you. I would be pleased to call the pages to your Honor's attention.

Before doing so, if I may, your Honor, I would like also to make this statement; that page 740 in the Hamilton case sets forth the burden on a private individual. We think that the Government certainly should not be required to do more than private individuals.

And in that connection I would like to quote from the Supreme Court in the case of Virginian Railway Company vs. System Federation No. 40,300 U. S. 515, at page 552, where the Supreme Court states: "courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

We contend, your Honor, that the affidavits, the letters [fol. 245] we have filed with you, plus the additional references to the depositions of Mr. Raymond Koontz and Mr. Mosman meet the burden that we are required to present to your Honor.

The Koontz deposition pages we rely on are pages 5, 6, 9——

The Court: Now, what page of what?

Mr. Williams: The Koontz deposition, your Honor.

The Court: The Koontz deposition. Here it is. What page now?

Mr. Williams: Pages 5, 6 and pages 9 through 25——

The Court: What do you point out specifically now?

Mr. Williams: At page 5, your Honor, it sets forth the position of the company, and at page 6 it shows the type of equipment it makes.

The Court: I have it.

Mr. Williams: I would like to state to your Honor that by comparing the testimony of Mr. Koontz on deposition pages 9, 10 and 21 and the deposition of Mr. Mosman, pages 19 and 85, it's quite clear to me at least that these two companies—each makes over $2,000,000 of bank vault doors, and that the combination of these two companies would affect a substantial amount of commerce in that $5,000,000 would be involved. We think that raises a very substantial question as to violation of section 7 of the Clayton Act.

[fol. 246] We also rely, your Honor, on the Mosman deposition at pages 11, 14-17 inclusive, pages 19, 26, 27, 28, 31 through 34, inclusive, 40-42 inclusive, and 52 and page 85.

The Court: I went over all these last night, so I know what is in here.

Mr. Williams: Basically, your Honor, we think that the references to the depositions I have cited, the affidavits submitted and the two letters written by Mr. Mosman are sufficient to make out a basis for the rendering of an injunction in this matter.

The Government is not required to prove for certainty, your Honor, that on the merits of this case it will have the prescribed effects under Section 7 of the Clayton Act. The only burden is to show sufficient facts to create a probability that the Government may prevail on the merits.

The Court: I think you have to have more than a probability. I would like you to show me how I am going to get around these rules or meet these rules that are required for the dissolving of a temporary restraining order unless you come up with the facts to explain, carry the burden.

Mr. Williams: Well, your Honor, we feel that we have presented sufficient facts to justify it.

The Court: Well, are you going to stand on what you have presented here then?

Mr. Williams: What we have now. We will be willing [fol. 247] to call additional witnesses, put Mr. Mosman on the stand and examine him or put the two bankers on the stand, examine them if you would like to hear them.

The Court: You mean Cody and Arata? Is that it?

Mr. Williams: Yes, sir.

The Court: Is there any question about the facts in their affidavits?

Mr. Fortas: Well, your Honor, I don't think they are meaningful.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: What is it?

Mr. Fortas: I say, I don't think those affidavits are meaningful, and we have no interest in refuting them. So I don't think they prove anything with respect to this case. They just show that two local bankers have restricted information about the industry, which is not incredible, but it doesn't prove anything.

The Court: Well, they prove one thing, that Mosler is quite a competitor.

Mr. Fortas: Yes, sir.

The Court: They will accept that and they are not going to refute it.

Mr. Williams: Very well, sir.

The Court: Is that as far as you can go at this point?

Mr. Williams: I would be willing to call Mr. Mosman to [fol. 248] the stand; but his deposition has been taken, your Honor, and we rely heavily on the letter he wrote to the Department. We think that that's an admission against interests in this matter.

The Court: Well, he wrote another letter too that doesn't help any, I don't think, a very lengthy letter to a Chicago counsel.

Mr. Williams: I think that shows—The importance of that letter, in our view, is that it shows that his counsel at least had serious question about the legality of this contract.

The Court: Yes, but was that the motivating idea behind that letter?

Mr. Fortas: If your Honor please, if I may interrupt here. The letter to Mr. Patterson shows that his counsel, the distinguished firm of Winston and Strawn, had doubts as to the legality of the contract at one time and then, after going into the facts, they changed their mind, expressed a contrary view to Mr. Mosman.

The letter is an indignant letter from Mr. Mosman to Mr.

Patterson because presumably they had changed their minds and, after deliberation, had arrived at the conclusion that the contract was not illegal. Of course, none of that is evidence of the kind that the Government needs to establish its case.

[fol. 249] The Court: Well, it does put a cloud on the case. That's that only thing.

Mr. Fortas: On their case; yes, sir.

Mr. Williams: Your Honor, for the record, may I identify the material we supplied yesterday?

The Court: I have it here. Yes.

Mr. Williams: Will it be necessary to identify it on the record now?

The Court: No. We will pass this to Mr. Crawford, and he will mark all of them.

Mr. Williams: Very well, sir.

Well, essentially, your Honor, we feel that, based upon the information and evidence we have presented to you, that we are justified in obtaining a preliminary injunction at this time. That's including the brief, the evidence and the citations in the deposition that I have made.

Thank you, sir.

Argument by Mr. Fortas

Mr. Fortas: In view of the Government's failing to present evidence here, your Honor, I don't believe that it's necessary for me to go forward.

I do want to say one word about the Hamilton-Benrus case. That was private litigation between two parties. Benrus had bought stock in the market in an attempt to get control of Hamilton, and Hamilton sued Benrus. There was no contract involved in that case; that is to say, there [fol. 250] was no effort to deprive private parties of the rights of their contract.

But most important of all, your Honor, and this really goes to the heart of the situation, there is a great difference between private litigation and a Government's suit here. If a private party had come in and had asked your Honor for a restraining order or an injunction to restrain the carrying out of a contract, under Rule 65(c) they would have to post a bond. In a case of this sort that bond would be in terms of millions of dollars, without any doubt.

Now, the Government doesn't have to do that, according to Rule 65(c), which says:

"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages," et cetera. And then it goes on to say: "No such security shall be required of the United States or of an officer or agency thereof."

Now, that makes all the difference in the world. Our basic point, as your Honor knows, seems to be beyond any question here whatever and is that if a temporary injunction is issued in this case, Diebold's contract rights will be gone; we will not have the protection of a bond and we will be irreparably injured.

The only other point that I should like to make your Honor is that it is not true, as Mr. Williams suggests, that [fol. 251] if the temporary injunction is denied, if Diebold goes ahead and acquires these assets—it is not true that your Honor will be powerless or that your Honor's power to deal with this situation at the end of a trial, where we have witnesses and the due process of law to which we are entitled——

The contrary is true. The fact is that Diebold is before this Court. This Court has jurisdiction over Diebold just as fully as the Court could have jurisdiction over it. The Court will have jurisdiction over Diebold to the end of the case, after there is an orderly trial on the merits.

Diebold has here represented by the sworn statement of its president, corroborated I may say by the Government's witness, Mr. Mosman—corroborated in part—I will get to that in a second—that Diebold will maintain these acquired assets intact.

The Court: That isn't quite correct. There is some qualification in there as to what he intends to do, to move part of his Canton outfit to Hamilton because they need the space and so on, and there will be an intermingling of the physical assets.

Mr. Fortas: No, your Honor. I will read that to you in a minute. But perhaps the statement wasn't quite as clear as it should have been. But I will now represent to your Honor, and will furnish a sworn statement to that effect, if your Honor chooses, by Mr. Koontz, president of the company,

[fol. 252] that there is no intention whatever during the pendency of this litigation to move any of the plant or facilities of Herring-Hall-Marvin.

The Court: Well, if that will be understood by your statement here, then it will clear up the point that I raised which appears in Mr. Koontz' affidavit.

Mr. Fortas: That is the fact. Mr. Koontz is in the room and I will ask him, if your Honor will permit this informality, whether I have stated a fact that Diebold will not, during the pendency of this litigation. and has not intended, to remove any of the plant facilities or equipment from the Herring-Hall-Marvin plant to Canton, or otherwise?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Raymond Koontz: That is precisely the fact.

The Court: No. It's just the reverse. There is more space it seems in Hamilton, and they are to move from Canton and take over——

Mr. Fortas: Your Honor, I think I know what the difficulty is——

The Court: That will clear it up, if you will say that there will be no change in the status of the physical assets pending the termination of this litigation.

Mr. Fortas: We do so state. We will furnish that statement on Mr. Koontz' oath.

The Court: All right.

Mr. Monroe: I would like to be heard, your Honor, when [fol. 253] Mr. Fortas is through.

The Court: What is it?

Mr. Monroe: I would like to be heard when Mr. Fortas is through.

The Court: All right.

Mr. Fortas: Your Honor, I have prepared an analysis of the facts and an analysis of the law; but in view of the position that the Government has taken and, in effect, its failure to go forward with the evidence here, I believe it would be an imposition on your Honor's time. And I respectfully submit that the application for a preliminary injunction should be denied, the temporary restraining order dissolved and that the representations made with respect to the maintenance of the physical plant facilities of the acquired company will be binding upon Diebold for

the duration of this litigation, which we are willing to put that in whatever form your Honor desires, if your Honor desires anything more than the sworn statement, and the Court will retain jurisdiction during the pendency of this case.

The Court: Mr. Monroe.

Mr. Monroe: If your Honor please, we would like to make a short statement on behalf of Herring-Hall-Marvin.

First, I believe there were some affidavits filed yesterday. We would like to file a counteraffidavit of Mr. Mosman. Particularly we can't agree to some of the things Mr. [fol. 254] Koontz said in his affidavit. We thought we would like to clear the record up with our position on it (handing documents to Court).

The Court: All right.

Mr. Monroe: As I believe we stated before, Herring-Hall-Marvin, of course, entered into this contract in good faith at a time when it thought it was legal.

Now, as that affidavit recites and I believe as the record otherwise establishes, we received a questionnaire, Herring-Hall did, along about August 10th, 1959 from the Department of Justice, which asked considerable information as to the acquisition. Now, in that letter Mr. Mosman was asked to go to Washington, which he did.

At that time he was advised by the Department of Justice that in their opinion there was no question the acquisition was illegal. Now, of course, with that information in the letter, that information and the subsequent filing of the suit, of course it cast considerable doubt as to the legality of the contract.

Now, the company, Herring-Hall, of course, is not one to participate in an illegal act. On the other hand, if the contract is legal, it desires to go through with its obligations they are under.

Now, our most difficult problem, of course, is probably one of business considerations because, if the company has [fol. 255] to operate for a period of time under a situation where there is considerable litigation as to the ownership of the company, it is going to create chaos and do irreparable harm to the company. Now, some of that is apparently already beginning to be felt.

Now, our position, if the preliminary injunction is denied—I believe Mr. Fortas has already stated that they

intend to pursue their contract remedies and ask us to go forward with the contract. Now, we feel that under those circumstances, if the injunction is denied, that the company will do its utmost to carry out the contract.

The Court: Anything further from either side?

Mr. Williams: That's all, your Honor.

The Court: Well, as I see it, the evidence—if you call it evidence—offered by the Government fails to meet the requirements of the stringent rule that is imposed on the Court, and the Court under the circumstances has no alternative but to dissolve the temporary restraining order.

Do you want to say anything more?

Mr. Fortas: I assume that means also the denial of the application for the temporary injunction, your Honor?

The Court: Well, as I said, I think the evidence shows that the prima facie case in violation of Section 7 of the Clayton Act was established in the beginning, so I don't want to undo that; that we will dissolve the injunction.

[fol. 256] Mr. Fortas: Yes, sir.

The Court: Now, do you feel that it's necessary for you to prepare a separate findings of fact and conclusions of law to carry that into effect?

Mr. Fortas: No, sir; not for a denial.

The Court: All right.

Mr. Williams: Your Honor, may I suggest this, that could you extend the temporary restraining order an additional ten days, which is in your power to do under the rules, so that we will have an opportunity to marshal more facts? Your Honor appreciates we have—

The Court: I don't think so, Mr. Williams. We spent half a day yesterday going over all of it, and you furnished your best evidence this morning to meet the motion to dissolve the temporary restraining order, and no good purpose would be served. It would just muddy the waters to that extent.

As I see it, that is about as far as we can go, isn't it, this morning?

Mr. Fortas: Yes, sir.

The Court: Do you want Mr. Crawford to make the record for you here?

Mr. Williams: Pardon, sir?

The Court: I say, did you want him to make a record and identify all the exhibits that you have offered as part of

[fol. 257] your case?

Mr. Williams: Yes, your Honor. Thank you, sir.

The Court: Do you want a copy?

Mr. Fortas: Yes, sir; we have ordered it.

The Court: Well, you will not want a copy of the exhibits. You already have those.

Mr. Fortas: That's correct, sir.

The Court: All right. We will be in recess.

("Affidavit of Raymond Koontz in opposition to Plaintiff's Motion for a Preliminary Injunction," dated September 1, 1959 was marked Plaintiff's Exhibit No. 1 for identification, was offered and received in evidence and is made a part of this record.

Deposition of Warren Mosman, taken August 29, 1959 was marked Plaintiff's Exhibit No. 2 for identification, was offered and received in evidence and is made a part of this record.

Deposition of Raymond Koontz, taken August 31, 1959 was marked Plaintiff's Exhibit No. 3 for identification, was offered and received in evidence and is made a part of this record.

"Defendant Diebold's Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction" was marked Plaintiff's Exhibit No. 4 for identification, was offered and received in eidence and is made a part of this record.

"Memorandum in Support of the United States' Motion [fol. 258] for Preliminary Injunction" was marked Plaintiff's Exhibit No. 5 for identification, was offered and received in evidence and is made a part of this record.

"Affidavit of A. Bruce Cody," dated September 1, 1959, was marked Plaintiff's Exhibit No. 6 for identification, was offered and received in evidence and is made a part of this record.

"Affidavit of Joseph Arata," dated September 1, 1959, was marked Plaintiff's Exhibit No. 7 for identification, was offered and received in evidence and is made a part of this record.

"Affidavit in Support of Plaintiff's Motion for Preliminary Injunction, signed by Larry L. Williams on September 1, 1959, was marked Plaintiff's Exhibit No. 8-A for identification, was offered and received in evidence and is made a part of this record.

"Option Agreement" between Diebold Incorporated and

Herring-Hall-Marvin Safe Company was marked Plaintiff's Exhibit No. 8-B for identification, was offered and received in evidence and is made a part of this record.

"Agreement of Purchase and Sale" between Diebold, Incorporated and Herring-Hall-Marvin Safe Company was marked Plaintiff's Exhibit No. 8-C for identification, was offered and received in evidence and is made a part of this record.

"Amendment to Agreement of Purchase and Sales" was marked Plaintiff's Exhibit No. 8-D for identification, was offered and received in evidence and is made a part of this [fol. 259] record.

Letter dated August 14, 1959 from Warren F. Mosman to Grier D. Patterson, Chicago, Illinois was marked Plaintiff's Exhibit No. 8-E for identification, was offered and received in evidence and is made a part of this record.

Letter dated August 18, 1959 from Warren F. Mosman to Robert A. Bicks, Acting Assistant Attorney General, Washington, D. C. was marked Plaintiff's Exhibit No. 8-F for identification, was offered and received in evidence and is made a part of this record.)

(Thereupon, at 11:30 o'clock A. M., the hearing in the above-styled action came to a close.)

[fol. 260] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

ANSWER OF DEFENDANT DIEBOLD, INCORPORATED—Filed September 16, 1959

Defendant Diebold, Incorporated, answering the complaint herein:

1. Denies each and every allegation of paragraph 1, except that it admits that the action purports to be brought under the statute therein referred to. It particularly denies

that it has violated or is now violating Section 7 of the Clayton Act.

2. Admits, for the purpose of this action only, the allegations contained in paragraphs 2, 3 and 4.

3. Denies each and every allegation of paragraphs 5 and 6, except that it admits that it is engaged in fabricating steel into a wide range of office equipment including steel shelving, burglar alarms, record desks, safes and chests, rotary files, safe deposit boxes, tab card handling equipment, night depositories and drive up windows, files and record storage equipment, and vault doors and accessories; that it also provides maintenance and repair service to its customers; that its principal manufacturing plant is located in Canton, Ohio; and that it distributes its products through its own outlets and dealers located in the principal cities of the United States.

[fol. 261] 4. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 7 and 8.

5. Denies each and every allegation of paragraphs 9, 10 and 11.

Wherefore, defendant Diebold, Incorporated, demands judgment dismissing the complaint against it.

F. A. Reister, 609 Rentschler Building, Hamilton, Ohio. William L. McGovern, 1229 19th Street, N.W., Washington 6, D.C.

Of Counsel:

Millikin, Reister, Fitton & Latimer, Hamilton, Ohio.

Arnold, Fortas & Porter, Washington, D.C.

Dated: September 16, 1959

Copy of answer furnished to District Atty.
J. T. Latimer, 9/16/59.

[fol. 262] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Transcript of Proceedings of November 30, 1959

(Hearing on Various Motions.)

Be it remembered that on Monday, November 30, 1959, at 12:05 o'clock P.M., the above-styled action came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division.

[fol. 263] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice, Walter T. Nolte, Attorney, Department of Justice, and Richard H. Pennington, Assistant United States Attorney.

For the Defendant Diebold, Incorporated: Arnold, Fortas & Porter by William L. McGovern, Esq.

For the Defendant Herring-Hall-Marvin Safe Company: (now Mosman Industries, Inc.) Taft, Stettinius & Hollister by John R. Bullock, Esq., Murray S. Monroe, Esq. and Charles S. Mechem, Jr., Esq. and Winston, Strawn, Smith & Patterson by Edward J. Wendrow, Esq.

[fol. 264] The Court: Now, what do we have here today?

Mr. Bullock: May it please the Court, we represent Mosman Industries, which was Herring-Hall-Marvin Safe Company before it was sold.

I wonder if I could present to the Court Mr. William McGovern of the District of Columbia Bar, who represents the purchaser in this case.

The Court: How do you do? Yes, sir.

Mr. Bullock: As your Honor will recall, we were before you on September the 2d and 3d on the motion of the Government to obtain a temporary injunction against the sale of Herring-Hall-Marvin's assets to Diebold. After two days of hearing your Honor denied that injunction.

Following the denial we filed a motion to dismiss Mosman

Industries, who had changed its name after the sale from Herring-Hall-Marvin.

The Government has now filed a motion before your Honor to require Mosman Industries, Herring-Hall-Marvin, to impound all proceeds received from the sale and to not make any investments or use of that money except after giving the Government 60 days' notice and an opportunity to appear before the Court.

Before discussing our motion, I would like to say just a few words, if I may, about that motion of the Government, if your Honor please.

[fol. 265] The Court: Well, let them speak for themselves.

Mr. Bullock: I think it is tied into our motion also, your Honor, though to this extent——

The Court: Well——

ARGUMENT BY MR. BULLOCK

Mr. Bullock: It is an extreme injunction requested by the Government which would have the effect of depriving Mosman of the use of its money. It is a relief that has never been sought, to the best of our knowledge, in any antitrust case. And in the only case in which there was an impounding of moneys, which was the Hartford-Empire case, there was a case of licensing fee under patents, as your Honor recalls, and the Supreme Court said it was not necessary to impound the money.

In this case, as shown by the pleadings, it would work a great hardship on Mosman to have it. I mention that to your Honor because our motion, being a motion to dismiss, we believe logically must follow from the order of your Honor in dismissing this injunction.

The only relief sought by the complaint against Mosman Industries was an injunction against making the sale. Your Honor gave the Government opportunity to present facts as to why that sale should be enjoined. Your Honor decided sufficient facts were not presented and authorized the lifting of the resulting order, even though, your Honor, at that time you were told, and the Government was told, that [fol. 266] the sale would be consummated if the injunction was lifted.

Now, the only relief sought against Mosman Industries in this case——

The Court: Well, just a question. Was the sale consummated?

Mr. Bullock: The sale was consummated September the 11th. The only purpose, your Honor, there could be for keeping Mosman Industries in this case now would be if your Honor should ever decide to order a divestiture of the property of Diebold.

Now, your Honor recalls you did order, your only condition of lifting the injunction was that Diebold, Inc. make no change in the physical assets. Diebold, the buyer, is subject to your Court's jurisdiction and to your Honor's discretion as to what should be done. Diebold can speak for itself.

But in this case no relief has been sought against Herring-Hall-Marvin except to prevent that sale being made. The sale has been made, and we claim that there is no possible reason for keeping Mosman in the case.

There has never been a case, your Honor, where a purchaser of property has been ordered to buy it back. Up to 1955 there was 24 cases of divestiture, but in no one of those cases, nor in any subsequent case, has the seller ever been ordered to buy the property back.

[fol. 267] W submit to your Honor that since no relief can be had against Herring-Hall-Marvin, now Mosman Industries, particularly since no relief has been sought in the case, since no new facts have been presented to your Honor since the previous hearing, we ask that Herring-Hall-Marvin, now Mosman Industries, be dismissed from this case.

Thank you.

The Court: All right. Let's hear from the Government.

Mr. Pennington: May it please the Court, I don't think you have met Mr. Nolte. This is Walter Nolte from the Antitrust Division.

The Court: How do you do?

ARGUMENT BY MR. NOLTE

Mr. Nolte: How do you do? Your Honor, in September Mr. Williams of the Antitrust Division was before your Honor, and I am taking up this matter now in his place.

If the Court please, the Government feels that the situa-

tion here is, in the first place, unusual. In the second place, we feel that material changes have taken place since the matter was before your Honor on the motion for a preliminary injunction at the beginning of September; and we feel that the application here made by the Government is a substantially different application from the application for relief at that time.

[fol. 268] May I say just briefly, your Honor, as you will recall, the preliminary injunction sought to enjoin the consummation of the purchase and sale agreement until this case could be heard and determined on the merits.

After your Honor's ruling that such a preliminary injunction should not issue, the parties did consummate the purchase and sale agreement on September 11th last, as a result of which Diebold now has substantially all of the property, business and assets of the company that was formerly Herring-Hall-Marvin Safe Company, including that name for corporate purposes of trade-name purposes.

Herring-Hall-Marvin has now become Mosman Industries, Inc.; and Mosman Industries, Inc. holds, in round figures, three million dollars proceeds paid in cash to it by Diebold upon the consummation of the purchase and sale.

Now, Mosman, understandably, has already made some disbursements for various and sundry purposes, but substantially all of that cash is still in its possession; and most of it, according to answers to interrogatories which the Government propounded during October, is in the form of Treasury Notes.

Now, the question as we see it, your Honor, is whether the public interest, as it appears in this situation at this time, requires that Mosman Industries be held to some [fol. 269] account during the continuation of this litigation with respect to that cash proceeds, or whether Mosman Industries is to be given an entirely free hand in the use of that money.

Now, we recognize this is a difficult situation. There is no disposition on the part of the Government to request that any absolute injunction be put down, nor is there any intention on the Government's part to prevent Mosman from investing these funds; nor is there intention on the part of the Government to ask for a situation where the

judgment of the Government, or even more of this Court, would be substituted for Mosman in terms of the investment and handling of these funds.

However, we come upon this difficult situation wherein this transaction was not a dealing in stock.

The Court: I understand all that. What I would like you to say at this point is: The Government must have made up their mind whether they are going to proceed with this case or drop it.

Mr. Nolte: In answer to that, your Honor, the Government has every intention of proceeding with the case. We have entered into a consent order with Diebold for the orderly and progressive production of documents by Diebold. That order was presented to your Honor early this month. Other work for the preparation of the case is pro-
[fol. 270] ceeding currently; and it is the Government's purpose and intention to bring the case to trial on the merits as soon as may be.

Now, during the discovery and preparation of the evidence we have this situation where, as we see it, Mosman, on the basis of the answers that it has given to the Government's recent interrogatories and on the basis of other matters of record now in this case, Mosman Industries, Inc. first wishes to be dismissed entirely from the case, to be out of the case entirely.

The Government counters by saying the Government wishes to have Mosman retained in the case; and the Government makes the further request that an order, a copy of which, your Honor, is appended to our motion papers—and that order is what we sometimes call a notice order, an order simply calling for a 60-day notice from Mosman Industries, Inc. to the Court and to the Government before it makes any investment disposition of these funds.

Now, this order, your Honor, is patterned somewhat after an order entered in the case pending in the Northern District, Western Division, before Judge K-l-o-e-b——

The Court: Judge Kloeb.

Mr. Nolte: Judge Kloeb, yes, that's right, in Owen, Illinois, United States vs. Owen.

The Court: Oh, I tell you, those are all cases that make this case strictly amateur.

[fol. 271] Mr. Nolte: Those are, it's true, your Honor, much larger, more involved cases than this.

The Court: Oh, yes. Those cases, Judge Kloeb told me, ran about four or five years.

Mr. Nolte: But, your Honor, this case has significance in terms of a new case in that it's an asset case rather than a stock case.

The Court: Well, if he is allowed to go ahead and dispose of—He doesn't own all the company, as I remember it. It was about 70 percent.

Mr. Nolte: He owns about 90 percent, your Honor.

Mr. Bullock: (Nodding.)

Mr. Nolte: Also Mr. Mosman personally has made an agreement with Diebold wherein he spends his full time with Diebold as an executive employee. And while we don't know the situation, we wonder what other disposition he could make of the cash proceeds than to invest in the type of investments which would not require his managerial skills in connection with the activities of Mosman.

The Court: Are you familiar with all the details that we passed on in the two days that we had hearings here?

Mr. Nolte: I have gone over all of them of record and consulted with Mr. Toohey and Mr. Williams.

[fol. 272] The Court: I thought you would be here asking the Government to dismiss the case because you didn't have a case.

Mr. Nolte: No, that's not the situation at all, your Honor. The Government intends to go forward.

The Court: Well, I went through all the papers too, and there was one thing that struck me which made me think that the Government would dismiss, and that was the fact—Who was the third party, the third company?

Mr. Nolte: Mosler.

The Court: Well, the Government was trying to stop the sale of Herring-Hall-Marvin to Diebold on the theory that it was lessening competition and so on. Then the evidence came out here that the people that really did the business around here was not Herring-Hall-Marvin, but Mosler.

And, of course, the Government wouldn't have taken the case in the first place if Mosman hadn't followed the advice of some of his Chicago lawyers, that he was selling for half of what it was worth. I examined the balance sheet. I think he was lucky to get out.

I don't think that I can go along with your theory to impound this money. In the first place, if it appeared that you had a strictly meritorious case and the interests of the public were definitely involved to the extent as claimed by [fol. 273] the Government, it would be one thing. But as I see it, the evidence that Mosler controls the business around here and Herring-Hall-Marvin didn't get any of it——

Mr. Nolte: Well, I think your Honor, the record so far made shows that Mosler, Herring-Hall and Diebold all were, prior to the merger, on a nationwide basis in this business and were competing one with another. In other words, Herring-Hall-Marvin before the merger was competing both with Diebold and with Mosler, and Mosler in turn was competing with the other two, and so on.

So the Government views the case as one where these three companies were substantially competitors, one with another, prior to the merger. Particularly, however, as I think was argued before your Honor in September, Herring-Hall-Marvin and Diebold were competing with each other prior to the merger.

In other words, certain of the sales activities and certain of the products made by each were somewhat similar, and they were in the same market competing with one another for sales to banks and other institutions of these lines of equipment which they manufacture.

So the Government views it, your Honor, seriously as a competitive situation which did exist involving these three [fol. 274] companies, and in particular involving Diebold on the one hand and Herring-Hall-Marvin on the other prior to the merger.

And so the Government views it as a possibility that if, on the merits, the merger is found to be contrary to the requirements of the provisions of Section 7 of the Clayton Act, then the possibility, not only of a divestiture, but also the possibility of recreating competition between Diebold and a company in a position somewhat similar to the position Herring-Hall-Marvin had before the merger is not beyond the bounds of likelihood or possibility here.

Now, I would like to say at this point to your Honor that the Government does not view its request as one for impounding the funds. We recognize that Mosman must in the interim invest these funds and deal with them and must

exercise its judgment. The question is: Within what limits, if any, is Mosman to be held?

We would have no proscription or injunction of any kind upon Mosman as of this time or if the Court were to enter the order which the Government suggests. Upon the entry of that order the Government would then only be entitled to 60 days' notice and, upon receiving notice, if the Government saw no problem in the proposed investment, the Government could accede, and that would be the end of it.

If the Government had some serious question about a proposed investment as to which it had notice, then the [fol. 275] Government would be required to come to this Court to present the matter to this Court for such action as it deemed necessary.

And it seems, therefore, to us, if the Court please, that it is a matter of viewing the possible public interest involved on the one hand as against the admitted ordinary right of Mosman to take these proceeds and do with the proceeds as it will, as it chooses to do.

We think that in this situation, because we have a merger-by-asset acquisition of two former competitors, that the competitor who has sold out should be retained in a position of substantial liquidity so that if a restoration of that competition is found to be necessary after trial on the merits, that the situation will then be such that the Court will be able to enter an order; whereas if Mosman, Inc. were to invest these funds in another operating business, as the answers to the interrogatories plainly spell out, we don't know whether that would be a new business that was being built up, a business that was being built up through the efforts of Mr. Mosman, through his executive ability. We have no idea what that situation might be.

We have reason to believe and to fear that if a free hand to invest in other operating concerns were retained by Mosman, Inc., as Mosman, Inc. suggests should be the [fol. 276] case, then by the time this case is determined on its merits Mosman, Inc. and its funds, which are the proceeds of this sale, would be far beyond the reach of the Court; and that then if a divestiture were required, Diebold would be required to go out on the open market and sell.

And that raises one point that I would like finally to suggest to your Honor. Mr. Mosman, according to the

record, on his own statements, has thought from time to time over several years of selling this business, and he went to Diebold in '57 and he went to Diebold again this year.

There is nothing to indicate that this is a readily salable enterprise to any general run of companies likely to be interested in this business. It may be a rather restricted market for this sort of an enterprise.

The Court: There is no question that it is a rather restricted market. As far as I am concerned, as I see it, he is very lucky to get somebody like Diebold to take it off his hands.

Mr. Nolte: That Diebold could get anyone who might come along to take the property off his hands raises a serious question. As the Government sees it, a very substantial competitor in this field, namely, Herring-Hall-Marvin, has already been eliminated.

[fol. 277] Now, whether that competition represented by the existence of Herring-Hall-Marvin is in this industry is still a question and will be until this case is disposed of on the merits.

The Court: Well, I tell you, as I see it here, we issued a temporary restraining order and gave the Government time to come up with some substantial evidence that it was justified. The Government practically confessed that they had nothing at the time, and we were obliged to dissolve the temporary restraining order.

I think for all practical purposes this would be a dangerous precedent here because there are so many things involved. When the income tax division gets through with Mosman, he won't have too much left and the Government will have gotten their share. So it looks like one arm of the Government is working against the other arm of the Government.

No. I think here——

Mr. Nolte: Well, that hasn't been specifically pointed out.

If I may, let me suggest to your Honor that at the hearing in September Diebold offered the assurance that the properties it would acquire would be kept intact as a separate operating entity. Now, that can only be for purposes of possible divestiture as far as this case is concerned. If [fol. 278] such divestiture possibility is being provided for by reason of that assurance on Diebold's part, then unless

Mosman is retained in the case and unless Mosman's proceeds from this purchase and sale are kept in substantially a liquid form so that Mosman can remain as a potential purchaser, there is little or no apparent value any longer, it would seem in the assurance of Diebold to keep the entities separate, unless Diebold is to be kept to a divestiture on the open market.

As it might be—we can't say for sure—but it might be that Mosman Industries, Inc. would be the most likely purchaser and that general equitable considerations would in the final analysis point in that direction.

Denial of Motion to Impound Funds

The Court: I am sorry; I can't go along with you on it. I don't think, if I went along with you, that it would be sustained by the Court of Appeals. I think it's a dangerous precedent. And they have got to have some leeway—How old is Mr. Mosman?

Mr. Bullock: I think he is 63 or 64.

Mr. Wendrow: Fifty-seven.

Mr. Bullock: Fifty-seven. I am sorry.

The Court: You see, this could become very complicated as far as his position with the Government on income taxes in capital gains and so forth. I would like it to appear that he shouldn't be subjected to a tying up of all of his funds [fol. 279] if he can work out his capital gains tax with the Government at this point.

Your Department had access to all the correspondence and knew what was going on in plenty of time. I am sorry. I don't like to cut you short, but I have given this an awful lot of thought. In fact, we were prepared to go into the trial of the case, as Mr. Toohey there remembers, when we granted a temporary restraining order. But they just came up with nothing flat, so I didn't have anything else to do.

Mr. Nolte: I fully appreciate your Honor's consideration of the case and study of it. We have, however, for disposition the question of Mosman Industries' motion to be dismissed from the case, which the Government opposes.

The Court: We will not make any order on that.

Mr. Nolte: The Government would oppose a dismissal of Mosman Industries.

The Court: We will leave it status quo, but not impound the money.

Mr. Nolte: Then the matter stands as Mosman Industries?

The Court: That's right.

Mr. Nolte: Would your Honor wish to have an order entered substituting in the title of the case and otherwise [fol. 280] Mosman Industries, Inc. for the former Herring-Hall-Marvin Safe Company?

The Court: I wouldn't want to make any change in that. Just leave it as is——

Mr. Nolte: Just leave it as is.

The Court: —but just to deny your motion to impound the funds.

Mr. Nolte: But otherwise to leave the case as is?

The Court: Yes.

Mr. Nolte: Thank you, your Honor.

Mr. Bullock: Your Honor, on the motion to dismiss, you are not deciding it at this time. It can be renewed at any time in the future?

The Court: Well, let the Government, the plaintiff here, make whatever move they want, and bring it up at that time.

Mr. Bullock: All right.

The Court: All right. We will recess until 2:00 o'clock.

(Thereupon, at 12:31 o'clock P.M., the hearing in the above-styled action came to a close.)

[fol. 281] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION FOR INTERLOCUTORY RELIEF—Filed November 18, 1960

The United States of America, plaintiff, by its attorneys, hereby moves this Honorable Court, pursuant to Rule 7 of the Federal Rules of Civil Procedure, as follows: To require defendant Diebold, Incorporated, to notify this Court and the plaintiff, in accordance with the terms of the attached proposed Order, upon the commencement of any negotia-

tions or action by said defendant for the disposition of any of the principal assets or properties acquired by said defendant through its acquisition of Herring-Hall-Marvin Safe Company on or about September 11, 1959.

The grounds for this Motion are:

1. Defendant Diebold, Incorporated, has informed plaintiff that it contemplates closing the existing sales offices of its Herring-Hall-Marvin Division;

2. The aforementioned sales offices were among the assets and properties acquired by defendant Diebold, Incorporated, through its acquisition of Herring-Hall-Marvin Safe Company on or about September 11, 1959;

3. It does not appear that plaintiff will learn of any other [fol. 282] dispositions that may be contemplated by defendant Diebold, Incorporated, of other properties or assets acquired by its acquisition of Herring-Hall-Marvin Safe Company on or about September 11, 1959, unless defendant Diebold is ordered by this Court to give notification;

4. The remedy provided by 15 U.S.C. sections 21 and 25 (1958) for violation of 15 U.S.C. § 18 (1958) is divestment of the illegally acquired stock or assets;

5. The closing of the aforesaid sales offices, or any like disposition of other assets of Herring-Hall-Marvin Safe Company acquired by Diebold, Incorporated, on September 11, 1959, may constitute an impediment to the efforts of this Court to render full and adequate relief in this proceeding under 15 U.S.C. 25; and

6. The granting of this Motion will preserve the power given this Court by 15 U.S.C. 25 to render full and adequate relief in this proceeding, protect the interests of plaintiff in securing such relief, and permit defendant Diebold, Incorporated, opportunity to avoid undue hardship by seeking prior approval of any contemplated dispositions of assets or properties acquired through its acquisition of Herring-Hall-Marvin Safe Company.

Respectfully submitted, Walter T. Nolte, John M. Toohey, Attorneys, Antitrust Division, Department of Justice, Washington 25, D. C.

Dated: November 18, 1960.

[fol. 283] ATTACHMENTS—PROPOSED ORDER

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil Action No. 4485

UNITED STATES OF AMERICA, Plaintiff,

v.

DIEBOLD, INCORPORATED AND HERRING-HALL-MARVIN SAFE COMPANY, Defendants.

Order

Whereas, this proceeding was instituted on August 24, 1959, by the filing of a complaint in which it is alleged that the defendant Diebold, Incorporated, (hereinafter referred to as "defendant Diebold") would violate 15 U.S.C. 18 (1958), commonly known as Section 7 of the Clayton Act, by acquiring the assets and properties of Herring-Hall-Marvin Safe Company; and

Whereas, said acquisition was effected on or about September 11, 1959, and on September 17, 1959, defendant Diebold filed an answer in which it denies the basic allegations on which the allegation in said complaint of violation of Section 7 of the Clayton Act is premised; and

Whereas, among the properties and assets acquired by defendant Diebold through its acquisition of Herring-Hall-Marvin Safe Company were the sales offices of the acquired company located throughout the United States; and

Whereas, on November 4, 1960, defendant Diebold informed plaintiff by letter that it is contemplating plans to close said sales offices, now part of defendant Diebold's Herring-Hall-Marvin Division; and

[fol. 284] Whereas, plaintiff has no information as to whether defendant Diebold plans any other disposition of the assets or properties acquired through its acquisition of Herring-Hall-Safe Company, and it does not appear that plaintiff will learn of any such disposition prior to a consummation thereof:

Now Therefore, without prejudice to plaintiff's right to seek appropriate relief with respect to the aforementioned contemplated disposition of the sales offices of the Herring-Hall-Marvin Division of defendant Diebold, it is hereby

Ordered, Adjudged and Decreed as Follows:

1. That upon commencement of any negotiations or action by defendant Diebold for the disposition of any of the principal assets or properties acquired through its acquisition of Herring-Hall-Marvin Safe Company, and in no case less than sixty (60) days prior to any disposition thereof, defendant Diebold shall notify this Court and the plaintiff of the commencement of such negotiations or action and the nature of the contemplated disposition. Said notification is to be given to the plaintiff to permit the plaintiff to obtain from defendant Diebold sufficient information to enable plaintiff to determine the significance of the contemplated disposition. Plaintiff thereafter may move this Court for an appropriate order if it appears that the contemplated disposition may tend to impede the power of this Court to render full and adequate relief in this proceeding.

2. As used herein:

(a) "principal assets or properties" shall mean any real or fixed properties and assets, manufacturing equipment and machinery, or intangible assets such as leaseholds and contracts of lease, formerly owned or controlled by Herring-Hall-Marvin Safe Company and acquired by de- [fol. 285] fendant Diebold through its acquisition of Herring-Hall-Marvin Safe Company on or about September 11, 1959, and having a value in excess of——

(b) "disposition" shall mean sale, lease or other transfer of control or beneficial ownership, directly or indirectly, by defendant Diebold.

——, ——, United States District Judge.

Dated: —, 1960.

[fol. 286] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER REQUIRING PRIOR NOTICE BY DEFENDANT DIEBOLD, INCORPORATED, WITH RESPECT TO ANY PROPOSED DISPOSITION OF HERRING-HALL-MARVIN ASSETS

On September 2, 1959, following the filing of the complaint in this case and prior to the acquisition of Herring-Hall Marvin Safe Company (herein "Herring-Hall") by defendant Diebold, Incorporated (herein "Diebold"), this Honorable Court heard argument on plaintiff's motion for preliminary injunction. In opposition to plaintiff's motion, defendant Diebold offered the following sworn statement of its president in respect to Diebold's plans for Herring-Hall (Affidavit of Raymond Koontz, p. 10):

> Should Diebold acquire the business and properties of H-H-M, it would be its fixed policy to continue the business and operations of H-H-M as a going concern. This would include the continued marketing of H-H-M's products under its own trade name; and the maintenance of its managerial, operating, selling and servicing personnel both at its headquarters in Hamilton, Ohio and in the field. In short, H-H-M would be operated as a distinct and separate entity competing with the many other enterprises now in competition with H-H-M.

[fol. 287] The Court was apparently satisfied that defendant Diebold, if permitted to consummate the acquisition, would undertake to maintain the assets and properties of Herring-Hall in each and every way specified by Mr. Koontz. The Court expressed concern (R. 15-16) only in regard to another statement in the affidavit of Mr. Koontz (p. 10, para. 28) which indicated that Diebold planned to move some of its own facilities at Canton, Ohio, to the Hamilton, Ohio, plant of Herring-Hall. Counsel for Diebold, however, allayed this concern of the Court by representing (R. 14-16) that there would be no change in the status of the physical assets pending the termination of this litigation.

Thus, it appeared to plaintiff that as of September 2, 1959, this Court and the parties understood that the sworn statement of Mr. Koontz regarding the maintenance of the business and operations of Herring-Hall, supplemented by the statement of defendant's counsel regarding the plant and facilities of Herring-Hall, defined and delimited the status which the assets and properties of Herring-Hall would have in the hands of Diebold following the acquisition.

On November 7, 1960, plaintiff learned by letter dated November 4 (See Affidavit of John M. Toohey in Support of Plaintiff's Motion) from counsel for Diebold that the defendant contemplates closing the sales offices of its Herring-Hall-Marvin Division (herein "Division"). These sales offices were operated throughout the country by Herring-Hall prior to its acquisition and were included in the properties turned over to Diebold as a result of the acquisition on September 11, 1959, following the denial of the plaintiff's motion for preliminary injunction. The November 4 letter, which advised plaintiff of the probable disposition of the sales offices, would appear to indicate defendant's belief that it is in no way required to notify this Court or plaintiff of any negotiations or actions that may be undertaken for the disposition of the acquired properties and assets. On [fol. 288] the contrary, defendant's position seems to be that it alone has the right to make the prior determination as to which properties and assets are to be governed by the above-mentioned statements of its president and its counsel.

This situation presents the clear probability that any negotiations by defendant for the disposition of any part of the acquired assets and properties may take such course as to make disposition virtually an accomplished fact before plaintiff can move to protect its rights.

To protect its rights, plaintiff replied to defendant's November 4 letter by letter of November 14, (See Affidavit of John M. Toohey), indicating its disagreement with defendant's understanding that no notice of the disposition of the sales offices is required, and advising defendant that plaintiff intended to seek clarification of this matter from the Court as soon as possible. On November 16, before plaintiff's attorneys could prepare and serve formal motion papers, it was learned that defendant's counsel had already secured a hearing date before this Court on November 18. Plaintiff has nevertheless filed a Motion, pursuant to Rule 7,

Federal Rules of Civil Procedure, for a Notification Order and respectfully urges this Honorable Court to consider its motion at this time, or, in the alternative, to set a hearing at a later time for an orderly consideration of plaintiff's motion.

For the reason stated below, plaintiff respectfully urges this Court to grant its Motion for a Notification Order:

1. That the remedy provided by 15 U.S.C. § § 21 and 25 (1958) for violation of 15 U.S.C. § 18 (1958) is divestment of the illegally acquired stock or assets;

[fol. 289] 2. That defendant Diebold, Incorporated, has indicated to the plaintiff that it contemplates closing the exiting sales offices of its Herring-Hall-Marvin Division;

3. That the existing sales offices of the Herring-Hall-Marvin Division of defendant Diebold, Incorporated, were among the assets and properties acquired by defendant through its acquisition of Herring-Hall-Marvin, on September 11, 1959;

4. That plaintiff has no information as to whether defendant Diebold plans any further disposition of property or assets acquired through its acquisition of Herring-Hall-Marvin, and it does not appear that plaintiff will learn of any such disposition prior to the consummation thereof;

5. That the granting of this Motion will preserve the power given this Court by 15 U.S.C. 25 to render full and adequate relief in this proceeding, protect the interests of the plaintiff in securing such relief, and permit defendant Diebold, Incorporated, opportunity to avoid undue hardship by seeking approval of any contemplated dispositions of assets acquired through its acquisition of Herring-Hall-Marvin Safe Company.

These reasons are more fully discussed below.

I

Divestment Is The Remedy Provided By Section 15 Of The Clayton Act (15 U.S.C. 25)

The Government believes that when a district court is exercising the jurisdiction given it by Section 15 of the Clayton Act to prevent and restrain violations of Section 7

of the Act (15 U.S.C. § 18) in a proceeding by the United States, its statutory duty is to terminate the holding of the stock or assets unlawful acquired.

[fol. 290] The Government has taken this position in its Notice of Appeal to the Supreme Court from the Judgment entered on November 17, 1959 in the *du Pont-General Motors* case. (See Notice of Appeal, pp. 3-4, attached to Affidavit of John M. Toohey in Support of Plaintiff's Motion). In that case, the Supreme Court held that du Pont's acquisition and subsequent retention of 23 per cent of General Motors common stock violated Section 7 of the Clayton Act. The Supreme Court remanded the case to the district court for determination of the relief necessary and appropriate to terminate the Clayton Act violation. The district court thereafter decided that du Pont might continue to hold the General Motors stock but that the voting rights should be passed over to its stockholders. In support of its decision the district court found that under Section 15 of the Clayton Act, divestment of the illegally acquired stock was not mandatory. It is from this Judgment that the Government has now appealed and it is expected that the Appeal will be heard this winter.

The Government believes Congress intended divestment as a remedy for violations of Section 7 of the Clayton Act because the Act appears specifically to require divestment of illegally held stock when violations of Section 7 are remedied through "cease and desist" orders issued by the Federal Trade Commission under Section 11 of the Clayton Act. In pertinent part Section 11 provides:

> . . . If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order *requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held* or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. . . . (Emphasis supplied)

[fol. 291] From the outset the Commission has followed this procedure and the Supreme Court has recognized that divestment is the remedy prescribed. See, e.g., *F.T.C.* v. *Western Meat Co.*, 272 U.S. 554, *Vivaudou, Inc.* v. *F.T.C.*, 54 F.2d 273 (C.A. 2); *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291; and the recent decision of the Hearing Examiner in *The Matter of the Procter & Gamble Company*, F.T.C. Dkt. No. 6901, June 17, 1960, in which the Examiner found a violation of Section 7 in Procter & Gamble's acquisition of the assets, trademarks, business and goodwill of the Clorox Chemical Company. The Examiner ordered Procter & Gamble to divest itself of

> . . . the assets of the Clorox Chemical Company, together with the plant, machinery, buildings, improvements, equipment and other property of whatever description which has been added to them, in such a manner as to restore it as a going concern in the manufacture and sale of household liquid bleach in which the said Clorox Chemical Company was engaged, in substantially the same productive capacity as was possessed by the said Clorox Chemical Company at, and immediately prior to, the time of the said acquisition by respondent The Procter & Gamble Company.

In *Arrow Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U.S. 587, the Court held that Section 11 specifies stock divestiture as the sole means by which the Trade Commission may enforce Section 7.

It is only reasonable to conclude that Congress contemplated the same type of remedy for the same type of illegal acquisition when the enforcement route followed is a court order pursuant to application by the Attorney General. In a long series of decisions under the Sherman Act involving stock acquisitions the Supreme Court has uniformly approved of divestment as the appropriate remedy. See, e.g., *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188-191; *International Boxing Club* v. *United States*, 358 U.S. 242, 255-259.

[fol. 292] The Government suggests that the same remedy is even more clearly required to terminate violations of Section 7 of the Clayton Act. There appears to be no reason why a proceeding brought by the Federal Trade Commission

should result in divestment whereas an action instituted by the Attorney General should not so result.

The Government is not now by its motion seeking an injunction against any disposition by the defendant Diebold of the acquired assets. The Government does seek, however, in the interests of preserving the power of this Court to render full and adequate relief in this proceeding, an order requiring defendant Diebold to make known to this Court and the plaintiff any negotiations or action it may undertake for the disposition of the acquired assets. This Court would then have the opportunity to consider in an orderly fashion whether any disposition proposed by Diebold would frustrate the efforts of this Court to order the remedy the Government believes is required by Section 15 of the Clayton Act following a finding of violation.

It is undeniable that the value of the acquired assets as a going business in Diebold's hands has changed and will necessarily continue to change. See Memorandum of Defendant Herring-Hall-Marvin Safe Company in Opposition to Government's Motion for Sequestration of Funds, dated November 30, 1959, pp. 7, 8. In that memorandum, it is stated

> . . . that Herring-Hall-Marvin employees have quit, new employees have been hired, Diebold has had access to [Herring-Hall's] customer list and has dealings with its customers, and it has had access to [Herring-Hall's] trade secrets. . . . Depreciation of assets have already taken place. The problem will be further aggravated at the end of two or three years, the earliest possible time this case could come to trial. At that time some of the physical assets may well have appreciated, others depreciated, the business grown and numerous innovations taken place.

[fol. 293] Plaintiff respectfully urges that the granting of its motion, insofar as possible until the termination of this litigation, will prevent further depreciation of the acquired assets and erosion of the business as a going concern.

II

The Meaning of "Assets" in Section 7 of the Clayton Act

The proposed order which plaintiff now seeks by its motion encompasses intangible assets as well as physical assets to preserve this Court's jurisdiction over the many valuable rights acquired by Diebold, such as Herring-Hall-Marvin's service contracts, patent rights, licenses, and license agreements, and contracts of lease, all of which may not yet have expired by their terms. It may be that some or all of the sales offices which Diebold now contemplates closing are maintained under contracts of lease or rental agreements. It may well be that some or all of these sales offices have substantial sales value in and of themselves by reason of their location; regular and potential customers may have found these sales offices easily accessible and therefore preferable to the sales offices of competing companies. The very fact of the existence of the sales offices may have provided a valuable advertising medium for the products of the Herring-Hall-Marvin Division. To close these offices now and to house the Division's sales personnel in Diebold's sales offices can obviously have only one result: to diminish the effectiveness of the Herring-Hall-Marvin Division as a "going concern" and "a distinct and separate entity," to use the language of Diebold's president in his sworn statement referred to at the beginning of this memorandum. All this can only add further to the changes in the business described by counsel for defendant Herring-Hall-Marvin Safe Company and referred to above.

[fol. 294] Until recently, there were no judicial interpretations of the meaning of the term "assets" as used in Section 7 of the Clayton Act. Now, however, the recent case of *United States* v. *Columbia Pictures Corporation, et al*, CCH Trade Reg. Rep. ¶69,766 (D.C. S.D. N.Y. 1960) provides ample ground for the inclusion of rental agreements and contracts of lease within the meaning of the term "assets." In that case, defendant Universal Pictures Company licensed defendant Screen Gems for a period of 14 years as its exclusive distributor of its copyrighted pre-1948 feature films for television distribution. Defendants contended that the term "assets" in Section 7 of the Clayton Act embraced only "amalgamations of business enter-

prises" and that a license agreement was not within the scope of the statute. The Court stated, at page 77,006, that:

> . . . [T]he word "assets" . . . is not a word of art, nor is it given a built-in definition by statute. As used in this statute [Section 7] and depending upon the factual context, "assets" may mean anything of value.
>
> • • • • • • •
>
> . . . There is nothing in the legislative history of Section 7 to justify the defendants' viewpoint that the word "assets" is to be interpreted through the eyes of tax experts or accountants rather than business men, or that "assets" means only "capital assets."
>
> • • • • • • •
>
> Since the proscribed transactions may be myriad in their variegation, Congress did not catalog them. It is for the courts to enforce the statute on the traditional case-by-case basis.
>
> We conclude that neither legislative history, policy, language nor logic would warrant the Court's restricting the meaning of "acquisition" of "assets" in Section 7 to transfers of property of any particular magnitude.

The Court concluded that by entering into and performing the exclusive license distribution arrangement, Screen Gems acquired a part of Universal's assets within the meaning of Section 7 of the Clayton Act.

[fol. 295] Following the sound reasoning of the Court's opinion in the *Columbia Pictures* case, there would seem to be no question that the sales offices of the Herring-Hall-Marvin Division, or the rental agreements representing Diebold's right to their use, are valuable assets. These assets should not be disposed of until this Court has had the opportunity for careful consideration of the effect such disposition may have on the capacity of the Herring-Hall-Marvin Division to function as a "going concern" for the duration of this litigation. These existing sales offices would become especially significant in the event the plaintiff prevails upon the trial of this suit. At that time they

would be indispensable in reestablishing the Herring-Hall-Marvin Safe Company.

For the foregoing reasons, plaintiff therefore respectfully urges this Honorable Court to grant its Motion.

Walter T. Nolte, John M. Toohey, Attorneys, Dept. of Justice.

[fol. 296] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

AFFIDAVIT OF JOHN M. TOOHEY IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER REQUIRING PRIOR NOTICE BY DEFENDANT DIEBOLD, INC., IN RESPECT TO ANY PROPOSED DISPOSITION OF HERRING-HALL-MARVIN ASSETS

District of Columbia, ss:

John M. Toohey, being duly sworn deposes and says:

1. The following is a letter from counsel for defendant Diebold to an attorney in the Antitrust Division, Department of Justice; it was received by the Division on November 7, 1960:

November 4, 1960

Larry L. Williams, Esq.,
Antitrust Division,
Department of Justice,
Washington 25, D.C.

Re: United States v. Diebold—Herring-Hall-Marvin

DEAR MR. WILLIAMS:

This letter will review the data that Mr. Crawford and I supplied you recently concerning the critical financial condition of the Herring-Hall-Marvin (HHM) Division of Diebold, Inc.

1. At the time of the purchase of HHM was consummated on September 11, 1959, Diebold was shocked to discover that HHM had drawn checks which were substantially in excess of its bank balances and that it was immediately necessary for Diebold to advance funds to cover current commitments.

Subsequent surveys disclosed that for substantial periods of time during most of the calendar year of 1959, HHM had also drawn checks in substantial excess of its bank balances. Thus, serious question is generated as to whether HHM was not insolvent at the time of its acquisition by Diebold.

[fol. 297] 2. Data sheets, prepared by HHM prior to its acquisition by Diebold and recently discovered in its files, reflect that from 1951 through 1957 production in terms of pounds shipped per employee had suffered a sharp deterioration, dropping from 33,289 pounds per employee in 1951 to 25,690 pounds in 1957. Similarly, during the same period, the ratio between net sales and payroll declined from 2.53 to 1.74.

3. In the eight months ended August 31, 1960, orders entered by the HHM Division declined $2,307,707 or 29.6% from the similar 8-month period of 1959. An even more serious barometer of the critical condition of HHM is the fact that shipments for the first eight months of 1960 exceeded new orders by $449,000, or approximately 10%.

4. The sharp drop in new orders entered during the first eight months of 1960 is undoubtedly attributable to the fact that Mosler Safe Company in September 1959 solicited away from HHM four of its key salesmen (Moser, Smith, Connelly, Jennings), the Herman Safe Company (HHM's West Coast distributor) and Safemaster (HHM's Washington, D.C., dealer). The total volume of orders received during the first nine months of 1959 from the three sources described above totaled $1,899,221. In the light of the foregoing, it is not surprising that during the first eight months of 1960 the HHM Division suffered a net operating loss of $26,000 including a loss of $106,000 during the month of July 1960.

5. The continuous losses during the first eight months of 1960, particularly the staggering loss of $106,000 in the month of July, has forced Diebold management to survey the operations of the HHM Division in an effort to effect whatever operating economies may be achieved so as to forestall further unsupportable losses. A careful analysis of the HHM operations indicates that the most immediate prospect of cost savings lies in the transfer of the HHM sales force from the existing HHM sales offices and letter drops

around the country to the existing Diebold offices. Without discharging a single existing HHM Division salesman, it is estimated that bringing such salesmen into the existing Diebold sales offices will result in estimated annual savings of $180,588, largely through the elimination of excess clerical help and rentals.

6. It is contemplated that the HHM telephone listings would be continued in each of the cities and towns but that the calls would be received in the existing Diebold offices for servicing by the joint sales force available. It is also contemplated that HHM promotional literature will be continued and that every effort will be made to preserve the viability and good will of the HHM label and brand names.

We do not understand that the present posture of the above described litigation requires that we notify the Department of these efforts to rescue the HHM Division from its present desperate financial condition, but we wished you to know of our efforts to put the Division on a sound and healthy operating basis.

Sincerely yours, /s/ Wm. L. McGovern.

[fol. 298] 2. In reply to the foregoing letter, plaintiff wrote to defendant's counsel as follows:

RAB:GDR
60-0-37-308

November 14, 1960
William L. McGovern, Esquire,
Arnold, Fortas & Porter,
1229 Nineteenth Street, N.W.,
Washington 6, D. C.

Re: United States v. Diebold—Herring-Hall-Marvin

Dear Mr. McGovern:

This is to acknowledge your letter of November 4, 1960, in which you state that Diebold, Incorporated, plans to close the existing sales offices of its Herring-Hall-Marvin Division.

You refer in your letter to financial data relating to Diebold's intended action and you state that this information was recently supplied to us by you and Mr. Crawford.

We assume that you refer to a recent conversation you had with Mr. Larry L. Williams of this Division, who advised, as you may recall, that any information you wished to furnish us regarding the financial condition of the Herring-Hall-Marvin Division should be in writing so that it might be given adequate consideration. Our records show that prior to our receipt of your November 4 letter the financial information contained therein was at no time furnished to us in writing.

With regard to Diebold's intention to close the sales offices of its Herring-Hall-Marvin Division, we respectfully disagree with your understanding that such proposed action does not require notice to the Government as plaintiff in the above-entitled proceeding. It is our intention, therefore to seek clarification of this matter from the Court as soon as possible.

Sincerely yours, Robert A. Bicks, Assistant Attorney General, Antitrust Division.

3. Attached to this Affidavit is a copy of the Government's Notice of Appeal to the Supreme Court of the United States in *United States* v. *E. I. duPont de Nemours, et al.*, Civil No. 49 C 1071 (N.D. Ill. 1959). There has not been sufficient time to secure certified copies of the attached Notice of Appeal but Affiant believes that the attached Notice is a true copy.

John M. Toohey.

Subscribed and sworn to before me this 17th day of November, 1960.

Sara B. McGraun, Notary Public.

My Commission Expires May 1, 1961.

[fol. 299] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1071

UNITED STATES OF AMERICA, Plaintiff,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, ET AL., Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on November 17, 1959.

This appeal is taken pursuant to 15 U.S.C. 29.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Judgment of United States Supreme Court, filed July 18, 1957.

2. Transcript of pre-trial conference held September 25, 1957.

3. Order appointing *amici curiae* and fixing time for filing plans for compliance, entered September 25, 1957.

4. Order marking Government's proposed final judgment filed as of October 25, 1957, entered June 26, 1959.

5. Order directing that ruling be obtained as to federal income tax consequences of plaintiff's proposed judgment, entered November 21, 1957.

[fol. 300] 6. Memorandum of du Pont, filed May 14, 1958.

7. Report and recommendations of Andrew J. Dallstream, *amicus curiae*, filed August 7, 1958.

8. Order directing that ruling be obtained as to federal income tax consequences of judgment proposed by Andrew J. Dallstream, entered August 8, 1958.

9. Report and recommendation of Manuel E. Cowen, *amicus curiae*, filed August 14, 1958.

10. Motion for order directing *amicus curiae* Dallstream to make available to all parties the results of his investigation, filed September 26, 1958.

11. Motion for order directing *amicus curiae* Cowen to make available to all parties the results of his investigation, filed September 26, 1958.

12. Transcript of pre-trial conference held October 29 & 30, 1958.

13. Memorandum of court with reference to plaintiff's motion for preliminary injunction, filed November 3, 1958.

14. Transcript of pre-trial conference held November 17, 1958.

15. Plaintiff's request for admissions to General Motors filed January 13, 1959.

16. Transcript of pre-trial conference held January 19, 1959.

17. Order with respect to motion of plaintiff for production of documents, entered January 19, 1959.

18. Printed transcript of hearings (pp. 1-3039) commencing February 16, 1959 and ending April 9, 1959.

[fol. 301] 19. Government Exhibits 1-3, 6-8, 10-101, 103-115, 117-168, 170-173, 175-290, 292-294, 296-413, 415-498, 519-534, 536-541, 548-694.

20. Du Pont Exhibits 1-2, 4-68, 70-75.

21. Christiana/Delaware Exhibits 1-20.

22. General Motors Exhibits 1-30.

23. Dallstream Exhibits 1-4.

24. Motion to strike defendant du Pont's exhibits 16 through 18 and 21 through 26 and testimony of witness Tepping based on these documents, filed April 9, 1958.

25. Pages 20-32, inclusive, of Memorandum on Behalf of the United States in Support of the Government's Proposed Final Judgment dated September 26, 1958.

26. Pages 1-3, inclusive, of Trial Brief for the United States dated April 29, 1959.

27. Opinion of the court, filed October 2, 1959.

28. Court's final judgment, entered November 17, 1959.

29. This notice of appeal.

III. The following questions are presented by this appeal:

(1) Whether the final judgment entered by the district court grants the relief necessary and appropriate to remedy the violation of Section 7 of the Clayton Act resulting from the acquisition and continued ownership by defendant E. I. du Pont de Nemours and Company of General Motors Corporation stock.

The following questions, which may be subsumed under the foregoing question, are also presented by this appeal:

[fol. 302] (2) Whether the district court misconstrued the Clayton Act by holding that Congress did not thereby intend that divestiture is the remedy to be applied upon determination that the stock of one corporation has been acquired by another in violation of Section 7 of that Act.

(3) Whether the district court improperly evaluated the factors to be given consideration in determining the relief necessary and appropriate to remedy a violation of Section 7.

(4) Whether the district court erred in concluding that there is no method by which General Motors stock unlawfully held by defendant du Pont can be divested without undue stock market and tax consequences.

(5) Whether the district court's conclusions respecting the stock market consequences of requiring du Pont to divest itself of its General Motors stock are clearly erroneous even if these conclusions are to be deemed findings of fact.

Robert A. Bicks, Acting Assistant Attorney General. George D. Reycraft, Paul A. Owens, Eugene J. Metzger, Bill G. Andrews, Edmund D. Ludlow, Attorneys, Department of Justice.

[fol. 303] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Transcript of Proceedings of November 18, 1960

(Hearing on Motion)

Be it remembered that on Friday, November 18, 1960, at 2:43 o'clock P. M., the above-styled action came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division.

[fol. 304] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice, George Reycraft, Attorney, Department of Justice, Walter T. Nolte, Attorney, Department of Justice and Richard H. Pennington, Assistant United States Attorney.

For the Defendant Diebold, Incorporated: Arnold, Fortas & Porter by William L. McGovern, Esq. and Milliken, Reister, Fitton & Latimer by Frederick A. Reister, Esq.

For the Defendant Herring-Hall-Marvin Safe Company (now Mosman Industries, Inc.): Taft, Stettinius & Hollister, by Charles S. Mechem, Jr., Esq.

[fol. 305] Mr. Pennington: If it please the Court, I would like to introduce these gentlemen. I think you know Mr. McGovern——

The Court: We know them from the other time.

Mr. Pennington:—Mr. Nolte from the Department of Justice; Mr. Toohey you remember; Mr. Reycraft.

The Court: Yes. Now we can make this short and sweet; it won't make me mad. We have been having a pretty big day.

ARGUMENT BY MR. MCGOVERN

Mr. McGovern: Well, Judge, I will certainly make my representations as short and sweet as I possibly can.

May I say in the first instance that I am out here first on an informal application. We don't have any motion pending because I don't believe any is called for.

What happened here, your Honor, was that, as you know, the Government moved for a temporary injunction to stop the acquisition of H-H-M by Diebold; and your Honor found there was no basis in fact to that injunction, and it was denied.

Unfortunately, Judge Druffel, it is also true that your Honor made some remarks at the hearing on November 30th of last year that proved more prophetic than I wish they had.

The Court: Will you repeat that again?

Mr. McGovern: I say, at the hearing on November 30th of last year, when the Government was seeking to impound Mr. Mosman's funds, your Honor made a couple of remarks [fol. 306] in the transcript which have proved to be more prophetic than I rather wish they were. Your Honor said—this is at page 11:

"Well, the Government was trying to stop the sale of Herring-Hall-Marvin to Diebold on the theory that it was lessening competition and so on. Then the evidence came out here that the people that really did the business around here was not Herring-Hall-Marvin, but Mosler." That's the Mosler Safe Company.

The Court: Well, that was the fact as I remember.

Mr. McGovern: It was the fact, sir, and I think it is the fact. The other remark you made immediately after that was:

"And, of course, the Government wouldn't have taken the case in the first place if Mosman hadn't followed the advice of some of his Chicago lawyers, that he was selling for half of what it was worth. I examined the balance sheet. I think he was lucky to get out."

I am saying, Judge Druffel: I regret to say today that you were very prophetic in both of those remarks.

When we went to the closing on September 11th of last year with Mr. Mosman and tendered our check in the amount of $2,800,000 to purchase the assets, we asked him to tender a check back to us for the existing bank balances standing in the name of H-H-M; and he then confessed to us for the first time that he was embarrassed but, unfortunately, he [fol. 307] couldn't give us a check because at that moment

H-H-M had drawn checks in excess of its existing bank balances in the amount of $41,000.

Subsequent checking by ourself, your Honor, reveals the fact that from time to time during the past eight or nine months the H-H-M bank balances got down very low. Indeed, on one occasion they got down to the figure (examining notes)—On September 3d, 1959, just eight days prior to the closing, H-H-M had in the bank $13.92.

The Court: That's a lot of money.

Mr. McGovern: The result was, Judge Druffel, that during the month of September, the first month after we acquired these assets, Diebold had to advance $500,000—one-half million dollars—in funds to meet the past-due and current obligations of H-H-M.

Now with regard to the second prediction your Honor made: Before we could get our feet firmly on the ground and ascertain what it was that was causing these losses in the company we had acquired, we got hit like a ton of bricks by the Mosler Safe Company, who solicited away from us the four key salesmen in the H-H-M selling organization and solicited away the entire west coast sales and distribution organization, namely, the Herman Safe Company, which was H-H-M's representative on the west coast.

So that within one month we were left with a company [fol. 308] that was in the gravest financial straits; we were left with a sales organization that was shattered by virtue of these competitive depredations by Mosler.

Now, we were accused of violating the law in buying this company. I didn't hear the Government come in, your Honor, and complain about the fact that Mosler, the big company in the field, took away fully twenty-five percent of our sales personnel and our gross volume sales.

The result of those two situations, Judge Druffel, was that in the last nine months—that is, the first nine months of this year—the company, the H-H-M Division of Diebold, has been going from bad to worse. It has suffered a drop in its commercial volume from $3,164,000—It has suffered a drop to that figure from $5,335,000 for the 8-month period of 1960 compared to eight months of 1959. That's a decline in gross sales volume, Judge Druffel, of more than 40 percent.

And the result of that, sir, is that the company has been

suffering—the division has been suffering very severe operating losses. It has shown a net loss during the entire period of time. And during the month of July in this year it suffered a staggering loss of $106,000.

Now, your Honor, Diebold is a publicly held company; and just in deference to the interest of our stockholders we have had to undertake whatever small measures we could to try [fol. 309] to reduce these losses. We cannot continue to bear them.

We had a survey made of the H-H-M operation, and it appeared that the best immediate way to save money was to try to relocate the remaining salesmen that we had left in the sales force, after Mosler got through taking their pick of them—relocate those salesmen in the principal cities of the United States over into the Diebold offices; and we could thereby save, we estimate, $180,000 in rentals, and in excess clerical help and in telephonic and stenographic help.

Now, we have undertaken to do that in an effort to cut down these losses. The important thing about that though, Judge Druffel, is this:

We propose—Because we are anxious to bail out, if we can, our investment from this H-H-M Company, we propose to take the H-H-M name and put it on the window right beside Diebold. We propose to continue to promote and exploit the H-H-M brand name by every means in our command. We propose——

The Court: Well, didn't you get that right when you paid for it?

Mr. McGovern: I think we did, your Honor. And as I say, the only reason why I am here, as I regard it on my own part, is this informal application to your Honor because when, as a matter of courtesy I thought, I went down to tell the Government what we were doing, originally six weeks ago, and then I wrote them on November the 4th because [fol. 310] they asked me to write the figures down for them—when I went down to tell them, they answered on November 14th that they felt that they ought to come to your Honor for a little clarification.

Now, clarification of what I don't know. Your Honor will recall that on the application of the temporary injunction, back last September, that we represented—and I want

to read this to your Honor—we represented, and I am quoting:

"During the pendency of this litigation," that we would not—and I quote—"remove any of the plant facilities or equipment from Herring-Hall-Marvin plant to Canton."

And then your Honor added: "Yes, or the reverse; in other words from Canton to H-H-M."

"And that no change in these physical assets would be wrought pending the determination of this suit."

Now, have in mind, your Honor, that you denied the temporary injunction because they failed abysmally to make a case out for it; and yet, despite that, we voluntarily made this representation.

I can tell your Honor today we have kept it. We have not mingled the physical assets between Canton and Hamilton.

The Court: Well, may I suggest something?

Mr. McGovern: But salesmen are something else? How can we keep them——

[fol. 311] The Court: I think that you forgot to mention that that arrangement not to move from Canton to Hamilton or Hamilton to Canton was to pend pending the final entry in this case.

Mr. McGovern: Right.

The Court: It wasn't a pat situation, permanent.

Mr. McGovern: No, of course not.

The Court: Well, let's hear from the Government, what their position is.

ARGUMENT BY MR. NOLTE

Mr. Nolte: If your Honor please, the Government goes back, as does Mr. McGovern, basically to the assurances made by Diebold in open Court before your Honor on the hearing on the application for the preliminary injunction, but we go back in that record to a basis which has been clear to us from that time and is clear to us now, on the basis of a rereading and reconsideration of that record; and we go back not to what Mr. McGovern has just referred to here now alone, but we go back to language in the affidavit of Mr. Koontz, president of Diebold, which was filed at that

time with your Honor in support of the motion of Diebold to dissolve the temporary restraining order.

And if your Honor will recall, the affidavit of Mr. Koontz included in paragraph 10—if I may read the following language:

"Should Diebold acquire the business and properties [fol. 312] of H-H-M, it would be its fixed policy to continue the business and operations of H-H-M as a going concern. This would include the continued marketing of H-H-M's products under its own trade name; and the maintenance of its managerial, operating, selling and servicing personnel both at its headquarters in Hamilton, Ohio and in the field. In short, H-H-M would be operated as a distinct and separate entity competing with the many other enterprises now in competition with H-H-M."

Now, it is true, as Mr. McGovern pointed out a moment ago to your Honor, that there was colloquy on the record having to do with the Hamilton-Canton situation in either direction. But that was an incident of total representation; and the representation, as we understood it then and as we understand it now, went to the going concern of H-H-M, that it would be operated as a division of Diebold after the merger with its plant and with its branch offices.

And as I come to the branch offices, your Honor, I should like to point out the nature and extent of those branch offices as we understand them now on the basis of documents produced to us by Diebold.

There are—or were—eleven H-H-M branch offices over the country; Atlanta, Boston, New York, Chicago, St. Louis, Kansas City, Minneapolis, I believe Houston. These branch offices sold H-H-M products as such from the H-H-M plant in Hamilton. That operation has been continuing since the [fol. 313] merger.

According to the figures given to us, it would appear that of the H-H-M total sales in 1958, to take the last year, full year, prior to the merger, of some $10,400,000, seven and a third million dollars of those sales funneled through those 11 branch offices.

Now, H-H-M also had other outlets, dealers and so on. But, as your Honor can see, nearly 70 percent of H-H-M's

total sales funneled through these branch offices. This is the information that the Government has.

And in that connection, I may say that the information that Mr. McGovern recounted to your Honor here today came to the Government first in writing in Mr. McGovern's letter of November 4, 1960, the first of this week; that some of the information that he recounted to your Honor here today is news to us, even today.

I say that only because I wish to emphasize that the Government in this situation must evaluate the effect of the proposed action in terms of the information and data that it has before it. And on the basis of the information we have before us, it would certainly appear to us that this H-H-M branch office setup is virtually a country-wide setup. It covers much more than a local area or even a regional area. It covers a substantial area of the country as a whole. It has accounted in the past for far above 50 [fol. 314] percent of the total sales of the organization. And so we are constrained—we think required—to view very seriously the suggestion that this branch office setup is to be discontinued.

Now, I would like to say an additional word to your Honor at this point as to why the Government feels that in the circumstances of this case the situation is so serious from its point of view. And I may say in the connection that it's because of that view precisely that on November 14 we wrote to defendant Diebold's counsel, taking the position that in the protection of the Government's interest we felt it necessary to point out that the assurances and representations made previously by Diebold's president in the affidavit and reaffirmed in the hearing before your Honor, that those assurances were broad assurances going to H-H-M as a total going concern, because the Government's interest here must necessarily be the interest of trying out the issue as to whether or not this acquisition is violative of the anti-merger provision of Section 7 of the Clayton Act.

And in that connection I should particularly like to point out to your Honor that the correlative provisions in 15 U. S. C. 21 and 25 regarding relief in the Government's view clearly require a divestment of the enterprise. And particularly in an asset acquisition case where the total organization, if you will, has been taken over, in such case

divestment of the enterprise a a going concern is the [fol. 315] indicated statutory remedy, if violation is found. So the Government feels that it's under a serious need to bring to your Honor's attention the fact that, as the information has been given to the Government and as the Government must see this situation, the proposed action is serious in scope in that a widespread network of sales offices having to do with the bulk of the organization sales is involved.

Further, in terms of relief, if divestment should be called for, the idea of a manufacturing plant without a sales organization any longer existing, would impede the powers of this Court, complicate immeasurably the relief and remedy situation.

The Court: Well, that would be all right now, but we are faced with realities here. Now, you have an investigating agency. Why can't you check what Mr. McGovern said? I think you could find out in a day about that.

Mr. Nolte: Well, investigating the facts alone, your Honor, wouldn't give us the answer. That would give the answer only as to what was proposed to be done; how many offices were to be eliminated, how many people would be affected and so on.

But let me point out now to your Honor that we have taken one further step, and I want very much to bring this to your Honor's attention at this time. At the time we [fol. 316] wrote the letter to counsel for the defendant on November 14 we advised them that we thought the matter serious and we thought we ought to apply to the Court formally for a clarification of the record as it was made before your Honor in September of 1959.

Now, we were preparing at the time we wrote that letter formal papers so as to file a motion to bring this matter before your Honor for a regular hearing on a motion that we would make, and we have filed that motion today and served it here now, so the motion is before your Honor.

The nature of that motion is to request your Honor to consider the matter on the basis of that motion. The motion is supported by not only a memorandum, but is also supported by an affidavit. And in the affidavit, if your Honor please, you will find quoted the exchange of letters of November 4 and 14.

In the memorandum your Honor will also find citations of cases relevant to this point of the statutory command that divestment follow if violation of Section 7 is found. And in that connection I should like particularly to point out to your Honor the fact that in the General Motors-du Pont case, which was decided in the Northern District of Illinois in 1959, the notice of appeal—the Government's notice of appeal to the Supreme Court specifically refers to this statutory requirement of divestment on a finding of [fol. 317] violation of Section 7.

And, if your Honor will notice, a copy of that notice of appeal is attached to our motion so that your Honor can see the language by which the Government stated the jurisdictional proposition to the Supreme Court.

Now, that case brings to the Supreme Court the issue of the necessity for divestment upon a finding of violation of Section 7. The case is to be argued in the Supreme Court this spring and will in all probability be decided by the Supreme Court before this term is over, involving this fundamental question.

In addition to that, I would just like to mention and refer your Honor to the cases cited involving the power of the Federal Trade Commission. If you will look at page 5, bottom of page 5, your Honor, and page 6, we recite authorities in connection with the power of the Federal Trade Commission under Section 11 of the Clayton Act and its power to order divestment, the fact that that power has been exercised and the exercise has been approved, if your Honor will note, in Supreme Court cases cited at the top of page 6; concluding then with a reference to the Fereral Trade Commission case involving the matter of Procter & Gamble where the acquisition by Procter of the Clorox Bleach Company was involved; and there is a quotation there from the Federal Trade Commission Examiner's decision.

[fol. 318] And on that statutory basis and the authority of this line of cases we bring this motion before your Honor. Now, the basis for the demand—the requirement of this motion is not that your Honor act at this time to enjoin the proposed action. The request of this motion and the order if I may say, is in the papers immediately after the motion.

The order that we propose that your Honor sign is an

order which would require defendant Diebold to notify this Court and the plaintiff 60 days in advance of proposed action, proposed action having to do with the disposition of any of the acquired assets.

And, incidentally, I may say we have discussed in the memorandum how we think these branch office arrangements and establishments are clearly within the scope of the acquired assets in this situation. I think it more or less goes without saying.

Then the order we contemplate is an order which would simply require a notice to this Court and to the Government 60 days in advance so that the Government would have an opportunity to get the type of information that your Honor a moment ago suggested we get; and then the Government would have an opportunity to decide on the basis of adequate information whether any application in the instance was required.

I want to emphasize again that the scheme of this motion [fol. 319] is such that no injunction is sought under this order; only prior notice, an opportunity to the Government to bring to the Court's attention, if necessary, after a proper review of the facts, the situation, if any, calling for a further order of the Court.

And we think, as I said before, that this is critically important in a case of this kind so as to preserve a going concern, if you will, as indicated in Mr. Koontz's affidavit, an acquired organization, against the eventuality that relief may, after trial on the merits, be unnecessary, so that adequate relief may be ordered and the power of the Court will not be impeded by developments in the interim.

Now, we recognize full well, your Honor, that changes have taken place, and they will continue to take place in this situation. We have no wish to request that an absolute status quo be imposed. We are only asking that each situation that comes up be considered and reviewed on the basis of adequate facts, and that then such order or action be applied for as may be required.

Now, in view of the circumstances, your Honor, I would just like to say this additionally at this time. Our motion was filed today. It was only handed to counsel as we came into the courtroom. Our request is, that if your Honor is so disposed, you consider our motion and the proposed

order now or, if your Honor would prefer, that you set the [fol. 320] subject of our motion down for a hearing on its——

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well, let me ask Mr. McGovern: What is your position on this 60-day proposition?

Mr. McGovern: Your Honor, my position—Let me just say first, Judge Druffel, that, as Mr. Nolte has pointed out, I didn't know about that motion until I came into Court. In fact, they gave it to me about ten minutes ago.

I understand that in so far as it purports to talk about a 60-day notice, it is talking about other arrangements and not this particular matter of sales offices, because I notified them about these sales offices back on October 20th and got no indication that they had any feelings about it. And we have gone ahead and done the best we could to save these amounts of money as fast as we could. So I couldn't possibly give anyone 60 days' notice.

Now, as to the matter of a 60-day notice generally, Judge Druffel, the Government has been in before your Honor three times. They came in originally on a request for a temporary injunction. They came in and asked for permission to impound Mr. Mosman's funds, and now they are back in and in effect asking for the same thing.

They are asking for interlocutory relief without ever having met the prima facie case that there is something that violates the law here.

The Court: Well, let me ask the Government counsel [fol. 321] here: What if this merger hadn't taken place and Mosman was now in bankruptcy, what would be your position then?

Mr. Nolte: Well, if the merger had never taken place and Mosman were now in bankruptcy, there would be no case before your Honor. But the fact, your Honor, is——

The Court: Well now, wait. Let's be practical about this. You don't want to put Diebold out of business now by hanging on Mosman's defunct organization, making them go through with a deal like that.

While the Government certainly has a right to enforce the Antitrust Act, there are limits too. You owe an obligation to Diebold, who is a taxpayer and paying their way now,

not to help wreck them and make them continue to assume all these losses.

Mr. McGovern: And may I suggest this, Judge Druffel, as Mr. Nolte and his associates know, there is a well-known exception in the Clayton Act Section 7 law to the effect that if the company reacquired was a failing corporation at the time we acquired it, then the acquisition can't violate the law because there was no real competition there at all.

Mr. Nolte: I take it we are not discussing failing conditions now.

Mr. McGovern: Yes, we are.

Mr. Nolte: Not today.

[fol. 322] The Court: Let's talk about the facts of the case now. I probably talked out of turn when I suggested that they were lucky to get by in it.

Mr. McGovern: I am saying, unfortunately, you were right.

The Court: Well, the bank balance, as I remember it, wouldn't carry them very far; and being close to Hamilton and knowing what happened to some of the companies in Hamilton, they were lucky to get out whole.

Since we are talking about it, the thting that always puzzled me was the willingness of the Government to lend themselves to Mosman because somebody in Chicago told him that he was only getting half of what it was worth. There are a lot of things to be considered in this case.

Now, I think Diebold is entitled to protection. That suggestion that nothing was to be done in moving from Hamilton to Canton and Canton to Hamilton was pending the determination of this suit.

As a matter of fact, this suit has been pending too long now. I think from what we learned here the Government should have come in and agreed to a consent entry of some kind to terminate it. I have to be frank about it and tell you the way I feel about it.

Mr. McGovern: May I say in that respect, your Honor, that as Mr. Nolte, I am sure, and his associates will con-[fol. 323] firm, we have been extremely cooperative with the Government in making available to them all of our files. They are scheduled to come out to Canton in about two weeks and go through another several thousand documents out there; and I myself frankly hope, Judge Druffel, that

when that investigation is concluded they will have satisfied themselves that they should come in and ask to have the case dismissed.

Mr. Nolte: I would like respectfully, your Honor, to take issue on the proposition of the narrowness of this case and of the situation with which the Government is confronted in the case.

The case is a nationwide case. It does not involve companies so large as many antitrust cases, but it involves two companies, the acquiring and the acquired companies, both of whom who operated on a nationwide scale, with a complicated line of products and an interlocking competition as to products in many areas. It's not a one-product situation. It's not a ten-product situation. It's a many-product situation, and it's complicated.

And I agree with Mr. McGovern in this, that we have been going along with production of documents and discovery, and we have depositions scheduled and we have interrogatories ahead and admissions and more discovery, undoubtedly on both sides. But it's a difficult situation from that standpoint.

[fol. 324] We have felt that discovery has been very slow in many instances, but we have understood that Diebold has a nationwide setup of its own to contend with. It has taken over H-H-M, which again has a nationwide setup. They can't gather all these documents and records readily for us. So it's a problem in that respect.

But I think the fundamental question again is: Can a reasonable and adequate semblance of a going concern operation with respect to the H-H-M division be maintained until this suit can be heard on its merits and determined?

And I think the question, your Honor, about the condition of H-H-M at the time of acquisition and other factors of that sort are part of issues to be tried on the merits. And I think in the meantime it's not unreasonable or unfair for the Government to ask that this Court have notice and that it have notice on a very limited time basis as to any changes that are to be made that are likely to affect the essential operation of this company, and are likely even more to affect the question of divestment of the company

of a going concern if and when that becomes necessary as a part of the relief to be granted in the case.

The Court: All right. That's enough of that——

Mr. Nolte: I hope that something reasonable on that score can be——

The Court: Now, what about the suggestion here that [fol. 325] because the facts as presently disclosed that the truth of the matter is that Herring-Hall-Marvin was failing and not subject to this kind of——

Mr. McGovern: Could I just say in that respect, Judge Druffel, so that it won't appear that I pulled any rabbits out of the hat recently: The listing of the checks for the six months prior to the time we took over was shown to Mr. Nolte—I think he will concede this—six months ago when he was out examining the files. He has been perfectly aware of that situation for a good many months.

The Court: What I am trying to get over is that this, of course, is no du Pont-General Motors case, or anywhere near it, and we wouldn't be affected by it to that extent.

As far as this Court is concerned, when the Administrative Office is on our back wanting to know why this case is pending so long, it seems to me, frankly—I dislike to say this—but it seems to me that there is a lot of affairs going on in the United States regarding mergers that are a lot more important than this is and that are not being noticed—and a lot of them have already been carried through.

I have to repeat this: As I analyze the balance sheet and the testimony in the case, the three important sales that were made in Cincinnati practically at the time this case was here were sales that Herring-Hall-Marvin didn't get, had no chance to get. Diebold didn't get them and Mosler [fol. 326] did get them. I think you are attaching too much importance to the position of Herring-Hall-Marvin here.

As I say, at the rate they were going, with—What was it, $13, in the bank at one time?

Mr. McGovern: $13.92.

The Court: And how much was the sales, two and a half million dollars?

Mr. McGovern: Two million, eight. But the point that I want to emphasize is, as your Honor has pointed out, that we are dealing with a real situation. We have since put about a million dollars into it to try to keep it going.

We have got a total investment, your Honor, of close to four million dollars. We can't go on suffering these losses merely because the Government thinks we are like General Motors and du Pont.

Mr. Nolte: I think we ought to go on and get into it by way of evidence. But I must point out that on the issue we are here on today, the proposed closing of these offices, the Government does not know by way of data and evidence submitted to it whether any offices have been closed as of now, how many will be closed. We have no information on this proposition on the basis of which at this time to come to your Honor and say, "This is the situation"; and it's precisely that information that we need when we apply to your Honor.

The Court: I understand all that. But I still think that [fol. 327] you have an obligation—your Antitrust Division has an obligation—to help the company now that's taken over this H-H-M. If they hadn't merged, there may not have been any H-H-M today doing business. It might have been in liquidation.

I think that for practical purposes Diebold did the country and the Antitrust Division a great favor in absorbing this company. I think that you ought to make up your mind real quick.

Would sixty days be too long to give them a chance to investigate and maybe come in with a consent?

Mr. McGovern: Your Honor, I am perfectly willing—I think I have indicated this to the Government from time to time. I am perfectly willing to sit down and try to work out some kind of a consent disposition of this lawsuit.

But I don't think that they have a lawsuit to begin with. I feel certain that when they get through looking at the files that they will have satisfied themselves that they don't. In fact, what we are doing is saving competition.

The Court: Can that be done in the next 60 days?

Mr. McGovern: Could we work out a consent decree in 60 days?

The Court: Yes.

Mr. McGovern: I think so. I am perfectly willing to address myself to it. I am just saying in the meantime, it's [fol. 328] unfair to ask us to go on losing money. We have

a chance here to save a few dollars; not many, but a few. But it's important we curtail these expenditures.

Mr. Nolte: Mr. McGovern, have these sales offices—Just to put the single proposition: Have the sales offices been closed as of now?

Mr. McGovern: Yes. Yes, they have.

Mr. Nolte: All of them?

Mr. McGovern: Yes. He talks as though this was the General Motors Corporation. He doesn't have to have a subpoena to find out, for example, in Washington what is the situation about these sales offices. These H-H-M sales offices were a little room upstairs on the second floor at 1010 Fourteen Street. Now, Mr. Nolte and I as Washingtonians know what that area is. They had a letter drop up there.

Mr. Nolte: They had an office on the first floor of the street. I walked by there three times a week.

The Court: Let me suggest this: If you will read the newspapers today, you will see where the railroads with the joint office here for the handling of freight cars and the distribution of freight cars are closing all around the country.

Now, what I can't see is the position of the Antitrust Division agreeing to the B. & O. and C. & O. and the New York Central merging and closing—If you will walk down to the Dixie Terminal, you will find—I was told the other [fol. 329] day—twelve rooms or stores down there have become vacant. A couple of years ago they were all retail ticket agencies. These mergers are putting those fellows out of business.

Now, those are really national problems that I think, if I have a right to express an opinion, that the Antitrust Division should be more interested in than in a little deal like this, trying to raise an issue over a company that was practically bankrupt when it was merged.

What have you got there that you want to talk about?

Mr. Nolte: I just wanted to call the attention of your Honor to the fact that as we see it, even in this situation, there are clearly still two sides as to condition and size. I have before me an article from the Wall Street Journal under date of October 10, 1960, recounting an address make by Mr. Koontz to the Security Dealers Association

in New York where he was reviewing operations for 1959 and for 1960 of the merged firms. And if your Honor would be interested, I would be glad to hand it up.

The Court: Well, I get it every day.

Mr. Nolte: It paints, if I may say, a far different picture from what we have been hearing here today and a reasonably optimistic picture of consolidated operations, even an optimistic picture of the Herring-Hall-Marvin operation.

It says: "Sales this year—" Mr. Koontz is being quoted [fol. 330] —"are expected to be about 20 percent ahead of 1959, but a good part of that increase comes from Herring-Hall-Marvin Safe Company, acquired by Diebold a year ago. Not counting results of that addition, Diebold sales were up about five percent for 1959." And he is talking about total sales of 40 to 41 million dollars for 1960.

Mr. McGovern: Sure, we will agree——

Mr. Nolte: This is as much a part of the picture as the other.

Mr. McGovern: —realizing what that means, of course we picked up a few additional sales; there is no argument about that.

The Court: What about the 60 days to give them a chance to show them your books and everything else, and see if you can't come in with a consent——

Mr. Nolte: Well, let's have the 60-day order entered, if we may, and we will proceed on the basis of that order.

Mr. McGovern: Well, the 60-day order is this thing here that I have just looked at; and I tell you, your Honor, what he is asking for, in effect, is a temporary injunction without being able to come in and make a prima facie showing of the necessary facts.

Mr. Nolte: I beg to differ with you. We are not asking for a temporary injunction. We are asking for——

[fol. 331] The Court: Well, it's a stand-by order which has the same effect.

Mr. McGovern: Sure, it is. My point about that is the point you just made yourself. We own this company. We have paid in the neighborhood of $4,000,000 total now, plus the additional funds we have put in. There is nothing

under the law that says we can't deal with our own property as we see fit from time to time to save money.

Now, that's the normal situation. When he comes in under Section 7 and says, "Yes, but I say maybe you are violating the law and I want you to be under these restrictive provisions"; I say he has an obligation to come in and make a firm, substantial prima facie showing that there is a violation of law involved here. And he hasn't done it.

The Court: Well, you weren't here in that first hearing, were you?

Mr. Nolte: No, I wasn't, your Honor.

The Court: Well, we granted a temporary restraining order on the basis of this gentleman's (indicating) affidavit; and I think we gave them two or three days, didn't we, to come up with some evidence. Finally they had none and we dissolved the injunction.

Now several months have gone by and I think it's the duty of the Antitrust Division to get in and get your evidence or come in and consent to terminating this.

[fol. 332] Mr. McGovern: I say, Judge Druffel, I am willing within the next 60 days to make every possible effort I can to work out a consent arrangement with them that they will be satisfied with; and I will show them any books they want to see to support what we say is the actual condition down there in Hamilton.

The Court: What do you say?

Mr. Nolte: May we submit an order? What is the order to be for?

Mr. McGovern: Let's agree that 60 days hence we will come back to the Court and give your Honor a report. I won't drag my heels on it. I don't know about the Government.

Mr. Nolte: Well, will you give us the facts in the meantime——

Mr. McGovern: I certainly will.

Mr. Nolte: —about the closing of the offices and a hundred and one other things?

Mr. McGovern: I told you about the closing of the offices on October the 20th, and there was no indication from the Department that you had any interest in it. I don't know where you have gotten this afterthought.

Mr. Nolte: The information we have, Mr. McGovern, on the closing of the offices, if I may say so, is contained in your letter of November 4, which doesn't give any facts [fol. 333] and figures about what offices——

Mr. McGovern: Your letter reflects the fact that I was in with Mr. Crawford to see Mr. Williams on November the 20th and gave him the details and showed him the facts and figures. The facts and figures were available. Mr. Nolte himself saw these check figures showing red figures here.

Mr. Nolte: That has to do with cash position in 1959. We are now talking about the closed offices. We got a letter from you on November 4. Now you say the offices are closed as of this moment. We don't know when they were closed.

Mr. McGovern: But I am saying you had these cash figures for six months. If they show you H-H-M was possibly insolvent at the time we bought it, you haven't got a Section 7 case at all. That's what I am saying.

The Court: Well now, as far as the 60-day deal is concerned, we don't want to put any order on. Give them a memorandum to justify your position that they have no Section 7 case here.

Mr. McGovern: All right.

The Court: And we will continue this matter for 60 days, and see if you can't get together with a consent order.

Mr. McGovern: All right, your Honor. I can only promise we will make every effort we can.

[fol. 334] The Court: All right. We will adjourn.

Mr. Nolte: Thank you, your Honor.

(Thereupon, at 3.31 o'clock P. M., the hearing in the above-styled action came to a close.)

[fol. 335] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Transcript of Proceedings of January 9, 1961

(Hearing on Mosler Safe Company's Motion to Quash Subpoena Duces Tecum.)

Be it Remembered that on Monday, January 9, 1961, at 2:18 o'clock P. M., the above-styled action came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division.

[fol. 336] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice and Walter T. Nolte, Attorney, Department of Justice and Richard H. Pennington, Assistant United States Attorney.

For the Mosler Safe Company: Edgar Barton of White & Case.

(No appearances for the defendants Diebold, Inc., and Herring-Hall-Marvin Safe Company.)

[fol. 337] The Clerk: Civil 4485, United States of America vs. Diebold, Incorporated and Herring-Hall-Marvin Safe Company; notice of motion of Mosler Safe Company for an order pursuant to Rule 30 (b) and 45 (b) of the Federal Rules of Civil Procedure quashing the plaintiff's subpoena duces tecum.

Mr. Barton: Your Honor, I am appearing for the motion in this next matter.

Mr. Toohey: Appearing against the motion, your Honor, on behalf of the Government.

The Court: All right. Let's sit down and see what it's all about.

Mr. Barton: May I speak first, your Honor?

The Court: Yes.

ARGUMENT BY MR. BARTON

Mr. Barton: If your Honor please, I represent Mosler Safe Company, who is not a party to this action, but who is engaged in the business of making bank vaults and commercial items in that field.

Now, the Government has served a subpoena after, I might say, the Government has examined for two days three of our top officials in New York pursuant to a notice served under Rule 26, to obtain information concerning the industry, the various products in the industry, the names of the competitors in the industry. They went into a very detailed examination of three of the executives of [fol. 338] our company about this industry.

Then subsequent to that examination in December they served a subpoena duces tecum on us for another examination before trial and for a subpoena duces tecum to produce from our records—If you will notice Exhibit A to our motion papers, your Honor, they want the units and dollar value of 23 different items which we manufacture for six years—six years. They want us to tell them how many of each of these things we manufacture and what the dollar value of it was. That, your Honor, is everything that we produce. It's our entire line. They want us to bring into Court for their purposes the information concerning that.

Now, it would be a tremendous job to get that information together. As our motion papers indicate, the bulk of this is to examine sales invoices and other documents, which would take up 6000 cubic feet of space. They are in 3000 file drawers, and they weigh about 60 tons. That's the bulk of the invoices that would be required to be examined or produced in order to comply with part of this subpoena duces tecum.

Now, it's true that with respect to some of the items we have in our files summary sheets, that is with respect to some of the items for some of the years.

But the main burden of my motion, your Honor, is not the oppressive nature of the production that's required [fol. 339] here, but is the fact that the Government is seeking unnecessarily to require Mosler Company to bare

its corporate soul, so to speak, and tell Diebold, its competitor, of what its sales are of which it's in competition with them.

Now, if I understand the posture of this case—and it's contained in the Government's answering papers to me—they say that there is some question as to the financial responsibility, the financial standing of Herring-Hall-Marvin at the time it was acquired by Diebold; and that that issue is to be argued before your Honor at some date to be perhaps now fixed or at some time in the future.

Now, if there is a question of whether this was a failing company at the time that Diebold acquired it, that disposes of the case. In other words, if it's a failing company, under the International Shoe case, the matter cannot violate Section 7 and it would not be necessary for us to disclose this information that is of a vitally secret nature.

Mosler Safe Company is not a publicly owned company. It's owned by a group, members of the family. They don't file S.E.C. statements. They are not required to publicly disclose the amount of their sales. It's a very important sales tool to its competitor to be able to know the amount of, not only its entire sales, but to obtain, as this subpoena duces tecum would, the details about its business, how many safes they sold, how many vault doors [fol. 340] they sold, how many grills, how many of each of the items, would be of inestimable damage to the concern.

The Court: All right. Suppose you gave it to them, what would they gain?

Mr. Barton: Diebold?

The Court: No. The Government.

Mr. Barton: The Government can't get it without Diebold seeing it. They are going to have an examination before trial, at which time we will produce pursuant to the subpoena duces tecum, and Diebold's counsel is sitting there and sees it. They can't use this information without Diebold's counsel having access to it.

My point is, your Honor, that it's unnecessary for them to have it here.

The Court: I thought the last time that we were here that this case was practically disposed of.

Mr. Barton: I wasn't here. I am counsel for Mosler Safe Company.

The Court: Well, I think that the argument of counsel for Diebold suggested that after the deal was closed, they learned that Herring-Hall had $13 in the bank?

Mr. Barton: I wasn't here. You understand I represent, not Diebold, but the company outside. But I understand that that was the facts.

The Court: Well, how close can you get to bank-[fol. 341] ruptcy?

Mr. Barton: I realize, your Honor, and that's my very point, that that issue has to be determined before your Honor. But on that issue, these sales figures of Mosler Safe Company, who is not a party to this case, are not relevant at all.

The Court: Let's see what the Government has got to say.

Mr. Barton: Yes.

ARGUMENT BY MR. TOOHEY

Mr. Toohey: May I speak to that, your Honor? We have filed a memorandum in opposition to the motion of Mosler Safe Company to quash plaintiff's subpoena duces tecum.

Now, I think in explanation to the Court I ought to describe first why this subpoena duces tecum was served upon the Mosler Safe Company after November 18, which was the date of the hearing at which the question of Herring-Hall's failing condition was raised before your Honor. That was the last time we were here before your Honor.

Our memorandum states, your Honor, that, as Mr. Barton has pointed out, we took the depositions of three officials of the Mosler Safe Company on November 29. Notices for the taking of those depositions were served long prior to November 18. It was our intention at the time we served those notices for the oral depositions to proceed at a later time, if necessary, with a subpoena duces tecum for the [fol. 342] production of necessary documentary data.

Now, between the time of the notices for the oral depositions and the serving of the subpoena duces tecum on December 13, we were here before your Honor on November the 18th. We felt that in view of the suggestions and

instructions that this Court made to counsel appearing at that time, that it was more necessary than ever for the Government to serve this subpoena duces tecum, and we did on December the 13th.

I would like to point out to your Honor that Mosler Safe Company's motion papers here today do not question the relevancy of the documents the Government is seeking in this connection. There is no question. There is no question raised here today, your Honor, as to the relevancy of the data we seek.

The claim here today made by Mosler is that it would be burdensome for them to produce these documents and that it would reveal trade secrets.

Your Honor, in the first connection, the burdensome claim does not extend, as Mr. Barton himself said, to all the documents the Government has asked for. It only relates to some of the documents; and as to those documents we have offered Mr. Barton the use and assistance of agents of the Department to help compile the information into summary form for our use. I think that disposes of the [fol. 343] oppressive and burdensome argument.

On the second point Mr. Barton claims that trade secrets would be revealed. Your Honor, I think the first consideration in that connection is whether in the light of the posture of this case justice would be better served by disclosing those facts, at trial or on whatever motion defendant Diebold may make, than depriving the Government of the opportunity to use those.

Now, let me state, your Honor, that Mr. Barton has raised the question; and if I may with propriety, I would like to pursue this question of whether the defense of failing condition is an absolute defense to the Government's Section 7 proceeding. I don't believe it is, your Honor.

The Court: Well, a subpoena such as this isn't favored. It's more of a fishing expedition, isn't it?

Mr. Toohey: Not at all, your Honor. I would like to read—and I don't think Mr. Barton would question this fact. We are not seeking documents that may lead us to admissible evidence.

The Court: He said you were seeking all of them.

Mr. Toohey: We are seeking very specific documents.

your Honor, which on their face are relevant. The relevancy has not been questioned by Mr. Barton.

Mr. Barton: Well——

Mr. Toohey: We are seeking all books, documents or [fol. 344] other tangible things, that contain information showing the Mosler Safe Company's yearly total sales. That is a summary figure for each of the named years, of their sales by units and dollars for these particular products. Those are directly relevant to the Government's case.

The Court: That's everything though, isn't it?

Mr. Toohey: There are 23 items involved.

The Court: And that's all you make?

Mr. Barton: That's right. They got that in the deposition, that that was our line of products, and it's all we make.

Your Honor, do you want to hear from me on this relevancy point?

The Court: Well now, we will come back to you.

Mr. Barton: All right. Thank you.

The Court: Go ahead.

Mr. Toohey: Your Honor, I think in the normal course of events the Government would have taken the deposition of Mosler officials and in the normal course would have served the subpoena it did for the production of documents.

We are now faced with a very urgent situation. And if I may with propriety say this, it was not until late last Friday afternoon that the Government learned for the first time that defendant Diebold intends to file a motion for [fol. 345] summary judgment sometime this month.

Now, your Honor, we conceive it to be our obligation in meeting that motion to do a diligent job. We cannot do it, your Honor, if we are foreclosed from the use of this information. Let me cite you the kind of information that was used in another Section 7 case and the use made of it, if I may.

In the United States vs. Bethlehem—and this was a case tried in the Southern District of New York by Judge Weinfeld, and he raised—he described the issues in a Section 7 proceeding as follows:

"* * * the essential issues which the Court is called upon to determine, and as to which the Government has the

burden of proof, are: the line or lines of commerce and the section or sections of the country in which the effects of the merger may be felt—in other words, the relevant market with respect to both products and geographic areas—and whether there is a reasonable probability that the merger may substantially lessen competition or tend to create a monopoly within the relevant market."

Now, what the court did in concluding that, for example, he said the proposed merger of Youngstown and Bethlehem "would add substantially to concentration in an already highly concentrated industry and reduce unduly the already limited number of integrated——"

[fol. 346] The Court: I can't find any fault with the Judge's decision in that case, but let's be practical here. Isn't there a question in your mind that Herring-Hall-Marvin was really on the verge of bankruptcy when this deal was consummated?

You didn't take issue with the suggestion of counsel for Diebold that they had $13 in the bank and that Diebold had to put up a million dollars.

Mr. Toohey: We couldn't very well take issue. He was not speaking to record facts.

The Court: What is it?

Mr. Toohey: There were no facts in the record regarding that point.

The Court: You were challenged then to produce them, if he wasn't telling the truth.

Mr. Toohey: Your Honor, we view that as argument of counsel. He didn't produce any evidence on that point. He may in the future. He may well——

The Court: Well, weren't you to check between the time you argued here that day and the next time? You were to go in there and check the books.

Mr. Toohey: We have been doing that, your Honor.

The Court: Well, did Diebold spend a million dollars to put the company in shape to continue?

Mr. Toohey: Well, your Honor, I know what the figure [fol. 347] is. I know what the figure is.

The Court: Is that approximate?

Mr. Toohey: No. It was half of that, your Honor.

The Court: Well, all right, five hundred thousand; would that be right?

Mr. Toohey: Yes, sir; that is their claim, your Honor.

But, your Honor, we conceive that on this motion for summary judgment defendant Diebold will raise as an absolute defense to the lawsuit the failing condition. We don't believe in law that failing condition is an absolute defense. We believe it's one of many facts that should be taken into consideration.

The Court: Well, isn't that a specific exception in the law?

Mr. Toohey: No, there is not, your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Barton: Your Honor, the legislative history is quite clear that if the company—It's not spelled out in the statute itself, but the legislative history is quite clear that a failing condition, the acquisition of a failing company, does not violate Section 7, irrespective of any other facts.

I am not arguing the Diebold case. I am interested here, your Honor, that they not require us to bare our [fol. 348] corporate soul when the case is going to be decided on another issue.

The Court: How far are you willing to go?

Mr. Toohey: Your Honor, let me——

The Court: Let me ask this: How far are you willing to go?

Mr. Barton: Your Honor, after that motion is determined, if it's decided that it is not a failing company and that, therefore, the case has to go to trial, then I think that these matters would become relevant.

The Court: What motion is pending on that? Has that been filed?

Mr. Barton: I understand from their papers that it's going to be filed this week.

The Court: Aren't we premature at this point then?

Mr. Barton: I think he is premature with his motion for a subpoena duces tecum, your Honor.

I am up against the gun. He has severed a subpoena duces tecum on my client to produce this information. Unless I move here and obtain relief from your Honor, my client has to comply with that subpoena duces tecum. I state that production in accordance with that subpoena duces tecum will be damaging to us commercially, unneces-

sarily, because if your Honor grants the motion made by [fol. 349] counsel for Diebold which is to be made—which I understand from counsel's papers is to be made—then it will be unnecessary to ever divulge any of this information.

I would submit to your Honor what should be done is to quash the subpoena pending the determination of the motion to be made by Diebold.

The Court: We don't have to necessarily quash it, do we? Can't it suspend?

Mr. Barton: Yes, you can do that, suspend our time until after that's determined.

Mr. Toohey: May I state, your Honor, the effect of doing that? The effect of quashing the motion at this time would be in effect predetermining that the defense of failing condition is an absolute defense to a Section 7 lawsuit, and I don't believe in law that that's the fact.

Now, Mr. Barton admits that some figures are available for some products. We are in a desperate strait here, your Honor. We are faced with a motion for summary judgment.

The Court: You are in a desperate position because of the weakness of your case; isn't that the fact?

Mr. Barton: That's right.

Mr. Toohey: We have had a very onerous road to follow, your Honor, in getting information to build our case.

[fol. 350] The Court: Oh, I would like to help you if I could, but I have a duty too.

Mr. Toohey: Your Honor, there would be no question but that the information we seek here today would be relevant to the Government's proposition for trial.

Mr. Barton: I would like to be heard on that relevancy question before your Honor decides that. Here are the facts as I understand them in this case: There are three companies in the industry basically; Diebold, Herring-Hall-Marvin and Mosler Safe Company. Herring-Hall-Marvin is acquired by Diebold. If it's not a failing company, the elimination of one by one of the three would constitute a violation of Section 7. I wouldn't have any doubt about that.

But the point is, if it's a failing company, it doesn't. If it's not a failing company, then it does. They don't

need this raft of figures they are asking from us to make a case that would have the necessary effect on competition if it isn't a failing company; and I submit to your Honor that the legislative history is quite clear that if it's a failing company, then that's controlling.

So I don't think it's quite as clear as counsel says, that these figures are relevant.

Mr. Toohey: Two points, your Honor. First, your Honor has mentioned the weakness of our case. I would like to emphasize again what Mr. Barton has just said. In an [fol. 351] industry where three companies are the main competitors and one acquires another, we felt it was a violation. Apparently Mr. Barton feels the same way.

But we feel now, in the posture of this case, that we are compelled to go further and compelled to dredge up this statistical information in order to back up our case. In order to do our duty, we must do that.

Now we are faced with a motion for a summary judgment. If we are not allowed to make the same presentation as we would for trial, we are in effect being foreclosed by the legal conclusion that a failing condition is an absolute defense to Section 7; and I state again, your Honor, that that is not the position of the Government.

The Court: Well, let me say this: The reason that this Court was obliged to dissolve the temporary restraining order was the Government's own evidence concerning two or three situations here where all three companies were in competition, and Diebold didn't get the business.

Mr. Toohey: Your Honor, unfortunately, during the time we had our evidence was taken entirely from the Cincinnati area. Had we more time, we would have gone to other states and other regions of the United States. We were confined to Cincinnati at that time.

The Court: Well, it was your evidence.

Mr. Toohey: Yes, your Honor. I merely would like to [fol. 352] point out that in preparing for trial we have gone and will continue to go to other areas throughout the country because we believe these three companies compete with each other throughout the United States. It is not a matter of the effect of this acquisition being felt in Cincinnati, but being felt throughout the United States.

The Court: Well, almost a year has gone by as I re-

member it, and you haven't come forward with any additional evidence.

Mr. Toohey: Your Honor, typical in an antitrust case, there is back and forth between counsel on the production of documents. We entered into a consent order on the Government's motion for the production of documents. We laid out a time schedule over a period of many months. We tried to work this thing out between counsel for both sides. We still have not finished that, your Honor, after all this time.

Mr. Barton: If your Honor pleases, in the posture in which this case is now, with it being conceded that there is going to be a motion for a summary judgment based on what I take it is almost a conceded failing condition——

Mr. Toohey: That hasn't been conceded. I want the record to be clear on that.

Mr. Barton: I may be interpreting what he said. But in any event, your Honor, under those conditions, if we [fol. 353] have to produce this information that's being requested now, it's clear that counsel for Diebold would be able to see it and Diebold would be able to see it because it would be on a hearing at which they would be present.

The cat would be out of the bag so far as my client is concerned; and the prospect is that the decision may go off on the failing company issue where I contend these figures have no relevance whatsoever.

I would be perfectly—I think that the suggestion that this could be vacated without prejudice to their right to reinstate it in the event the motion for a summary judgment based on the failing company doctrine is not granted——

The Court: No. I think it would be better to extend the time for answering the subpoena. Meanwhile let Diebold file their motion for summary judgment and be prepared to produce evidence here of the failing status of the other company——

Mr. Barton: That's right.

The Court: —to see whether or not it does affect Section 7.

Mr. Toohey: But, your Honor, if that is the presentation made on the motion for summary judgment, that is the case on the motion for summary judgment should be

granted, defendant, on a showing that a failing condition existed in the acquired company prior to its acquisition, [fol. 354] then we have made a new rule here that failing condition is an absolute defense to any Section 7 lawsuit.

The Court: Well, that's the position of Diebold in here?

Mr. Toohey: That's the position that they will take and they will argue, your Honor.

The Court: Well, if they can establish it, doesn't that end it?

Mr. Toohey: But, your Honor, we are in fact precluded from arguing anything else.

The Court: Well, you are not precluded from arguing anything you want to if you will just set it out in advance so we will know what's coming here. But you walk in with what the courts have held practically amounts to a fishing expedition, with all the books and papers——

Mr. Toohey: If your Honor please, if I may, with all respect, I would like to say this is not a fishing expedition. There is no question that the share of the market of each of the three companies involved is highly relevant to a Section 7 proceeding. It's not fishing.

Mr. Barton and his clients admit that they have the information. They do not question the relevancy of this information to the Government's case. It is not a fishing expedition. We are here after evidence which we know now is going to be admissible.

[fol. 355] The Court: I was going to suggest, and I did ask the counsel how far you were willing to go——

Mr. Toohey: Your Honor, let me suggest this: In a letter which is attached to my affidavit and this memorandum (indicating) and which I read to Mr. Barton on Friday morning, we have offered to consult with Mr. Barton on some kind of a reasonable protective device to prevent indiscriminate disclosure of the data he wants to protect. We are willing to do that.

Mr. Barton: And I will be glad to tell you my answer to that. When he read it to me at 5:00 o'clock on Friday afternoon, I said, "What suggestion is there? You can't talk about something like this and have a protective order when anything they obtain from us must be shown to Diebold's counsel immediately. It will be in a proceeding in which Diebold's counsel is present."

Now, Diebold is going to argue to your Honor, I am sure, as counsel here concedes, that a failing company—if Herring-Hall-Marvin was a failing company, that it is a defense to Section 7, without more——

Mr. Toohey: No, your Honor.

Mr. Barton: Now, wait a minute.

Mr. Toohey: Let me say I haven't conceded that. That's quite contrary to my argument.

Mr. Barton: I didn't say you had conceded. I said that [fol. 356] Diebold's argument is going to be that. And if your Honor sustains that argument, then these figures that they want from us do not become necessary, but we will have already disclosed our vital information to Diebold.

And I might say it will be done without any counter-disclosure from Diebold to us. In other words, our figures will be known. Their sales people will have our data with regard to each of the products that we produce and they will be able to use those figures to a fare-thee-well out in the field. I mean this matter of who is first, whose product is the most popular, it's a sales tool. And to force us to go through and give them an itemized account of our sales year by year is the grossest form of disclosure when it isn't necessary.

And I am pointing out, your Honor, that if your Honor decides on this motion for summary judgment that there was a failing company and that that was a defense, then the disclosure of this information never becomes necessary.

The Court: Well, at this point I think it would be an abuse of discretion if I granted your motion—I think here what we should do is to suspend this hearing pending the filing of the motion for a summary judgment. Then, as I say, we will have Diebold produce evidence of the fact that Herring-Hall was a failing company and that this proceeding isn't subject to Section 7, and give you a chance [fol. 357] to cross examine, show that it was otherwise, because if we hold that it wasn't subject to Section 7, that disposes of the matter. Then your Court of Appeals is open for you.

I don't see that we can do anything other than that. I don't want to rule on your subpoena motion today, but just suspend it on that. You will have the whole case before you then. You will make a full record.

Is that about your idea?

Mr. Barton: Yes, your Honor. In other words, as I understand it, you are reserving decision on our motion to quash?

The Court: That's right.

Mr. Barton: And in the meantime, of course, we are not required to comply with it until your Honor rules?

The Court: That's right.

Mr. Barton: That's very good.

The Court: Now, do we want to talk about a time when this is to be done, or do we have to wait until the motion for summary judgment is filed?

Mr. Barton: Your Honor, I think just wait until that is done.

Mr. Toohey: Your Honor, I feel that we have to wait—The next move is up to defendant Diebold.

As I say, if I may with propriety, the Government learned last Friday—late last Friday afternoon that Die- [fol. 358] bold intends to file a motion for summary judgment, probably returnable the 23d of this month.

The Court: Did you check their statement that there was a time right before or after this deal went through that they had $13 in the bank?

Mr. Toohey: Your Honor, we have our own agents and accountants working on the material they have submitted. They have submitted material which reflects that on a certain day in September there was $13 in the bank. The significance of that against a lot of other financial data we haven't yet determined because our people haven't come back to us yet with an answer.

The Court: Well, you know what I suggested the last time you were here, that in the opinion of this Court the Antitrust Division has an obligation to bolster businesses rather than sink them, which could happen here.

Now, it seems to me from just a hurried examination of the financial setup of Herring-Hall-Marvin at the time, that they were just a step away from bankruptcy, that if this deal hadn't gone through, I don't think they could have stayed out of bankruptcy or reorganization. That's it.

So we will just continue this until the next move. That's all.

Mr. Barton: All right, your Honor.

(Thereupon, at 2:48 o'clock P. M., the above-styled hearing came to a close.)

[fol. 359] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

MOTION OF DIEBOLD INCORPORATED FOR SUMMARY JUDGMENT—Filed January 19, 1961

Defendant Diebold, Incorporated, by its attorneys, hereby moves this honorable Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on the ground that, as more fully appears from the affidavits, reports, and audits attached hereto, there is no genuine issue as to any material fact and Diebold, Incorporated, is entitled to judgment as a matter of law.

Respectfully submitted, Frederick A. Reister, William F. McGovern, Attorneys for Diebold, Incorporated.

Dated: January 19, 1961

[fol. 222a] ATTACHMENT TO MOTION

AFFIDAVIT OF FRANK D. ROBINSON

COUNTY OF STARK,
State of Ohio, ss:

FRANK D. ROBINSON, being duly sworn, deposes and says:

1. I am Vice President and Treasurer of Diebold and I am fully conversant with all of the facts and circumstances surrounding the purchase of the assets of the Herring-Hall-Marvin Safe Company (HHM) by Diebold in the summer of 1959.

2. On or about May 25, 1959, Mr. Warren Mosman, President of HHM, presented to Diebold in Canton, Ohio, a balance sheet of HHM which purported to show the condition of the latter company as of April 30, 1959. This balance sheet, which was attached to the option and purchase agreements executed by HHM and Diebold on June 19 and July 17, 1959, respectively, (and a copy of which balance sheet is attached hereto as Exhibit A), purported to show that as of April 30, 1959, HHM had cash on hand and demand deposits of $115,507.32. Both the option and purchase agreements warranted that the April 30, 1959, balance sheet "truly and accurately, in accordance with generally accepted principles of accounting applied on a basis consistent with those of prior years" reflected the assets and liabilities of HHM as of April 30, 1959. Subsequently, and prior to the execution of the option agreement on June 19, 1959, Mr. Mosman informed Diebold that he could not warrant the April 30, 1959, balance sheet because for the purpose of that sheet he had reclassified $100,000 of "receivables" as "cash". He did not inform us that the April 30, 1959, balance sheet also failed to reflect $28,165.36 of outstanding April payroll checks. Subsequent audit of the books of HHM as of April 30, 1959, reflected that instead of a cash balance of $115,507.32 as reflected on the April 30, 1959, balance sheet orginally transmitted to Diebold as a basis for negotiating the sale, HHM actually [fol. 222b] had a net overall deficit cash balance (overdraft) of $12,658.04. (Lybrand, Ross Rept. #1, attached hereto as Exhibit B, Sched. A and B.)

3. I, as the principal Diebold representative, attended the closing of the purchase on September 11, 1959, and was present when Mr. Mosman told me and the other representatives of Diebold that he could not give us a check for the cash balance as of the close of business on September 10, 1959, in HHM's principal account, the First National Bank and Trust Company of Hamilton, Ohio, because the account was overdrawn in the amount of approximately $50,000. He did give us checks for a few smaller accounts ranging from $800 to $9,477.90, representing balances in other accounts. Actually, the First National Bank and Trust Company of Hamilton, Ohio, was overdrawn on September 10, 1959, by $53,978.59. Crediting against this deficit the smaller amounts in other banks, the company on September 10, 1959, had a net overall deficit in all accounts of $35,596.61 (Lybrand, Ross Rept. #1, Sched. A.)

4. As a result of the overdraft disclosed to us at the closing on Friday, September 11, 1959, Diebold caused $200,000 in cash to be deposited in the First National Bank and Trust Company of Hamilton on the second next banking day, September 15, 1959. Shortly thereafter, on September 28, 1959, Diebold deposited an additional $300,000 in cash in the First National Bank and Trust Company of Hamilton. A subsequent deposit on October 22, 1959, brought the aggregate cash advances by Diebold between September 15 and October 22, 1959, to a total of $503,801.90 to meet current and past due obligations of HHM. (Lybrand, Ross Rept. #1, Sched. F.)

5. Examination and audit of the books of account of HHM immediately upon Diebold's taking possession of them reflected the fact that the company had suffered operating losses between July 1 and September 10, 1959, of $206,953.51. [fol. 222c] 6. Subsequent examination and audit of the books of account of HHM reflected that as of September 11, 1959, HHM had accumulated past due trade bills dating back to January 1959 in the amount of $244,127.68. In addition to this extraordinary amount of past due accounts, HHM on September 11, 1959, also had currently due trade bills in the amount of $499,833.66. (Lybrand, Ross Rept. No. 1, Sched. E.)

7. Subsequent acquisition of the books of account of

HHM gave us records which disclosed that HHM had been overdrawn on its principal bank account in the First National Bank of Hamilton and on its total regular commercial account bank balances during 1959 as follows (Exhibit I to this affidavit shows the amounts of these overdrafts by specific calendar day):

Month	Total Working Days	Number of working days overdrawn	
		First Nat'l. Bank of Hamilton	Total Bank Balances
January, 1949	21	3	0
February	20	1	0
March	21	5	0
April	22	13	8
May	20	10	10
June	22	8	2
July	22	17	8
August	21	15	7
Sept. (through the 10th)	7	6	6

8. Subsequent examination and audit of HHM accounts also disclosed that: (1) during the entire month of May 1959 the regular payroll account of HHM in the First National Bank and Trust Company of Hamilton was overdrawn in amounts ranging from $24,466.29 to $54,297.52; (2) during at least half the month of May the overdrafts on the regular payroll account were reimbursed by overdrafts on HHM's general account in the First National Bank and Trust Company of Hamilton which was itself also overdrawn in amounts ranging from $38,551.37 to $116,809.86; and (3) on May 1, 1959, the HHM accounts in all banks were overdrawn in the amount of $79,037.17, and on May 8, the accounts in all banks were overdrawn in the amount of $57,325.79. (Lybrand, Ross Rept. #1, Sched. C.)

[fol. 222d] 9. Examination by the auditors of the HHM books of account disclosed that the June 30 balance sheet of HHM which purported to reflect a net cash balance in the regular account at the First National Bank and Trust Company of Hamilton, Ohio, of $35,942.21, failed to reflect outstanding checks in the amount of $46,858.62. When adjustment was made by the auditors to account for these outstanding June checks, HHM was shown to have had an overdraft on the regular account of the First National Bank and Trust Company of Hamilton as of June 30, 1959,

in the amount of $10,916.41. (Lybrand, Ross Rept. #1, page 2.)

10. At the hearing before this Court on November 18, 1960, counsel for Diebold represented that HHM's bank statement from the First National Bank and Trust Company of Hamilton as of September 2, 1959, reflected a balance of only $13.92. Subsequent examination and audit of HHM's books of account disclosed that on September 3, 1959, HHM actually had overdrafts on the First National Bank and Trust Company of Hamilton in the amount of $73,127.98. (Lybrand, Ross Rept. #1, page 2.)

11. As a result of the hearing before this Court on November 18, and after consultation with government counsel on November 25, 1960, I retained services of Lybrand, Ross Brothers and Montgomery to examine and audit the balance sheets, profit and loss statements, all necessary supporting data, and books of account for various periods during which negotiations for the sale of the assets of HHM were pending and to make the reports thereon which are attached hereto as Exhibits B, C, and D. Lybrand, Ross were selected for these examinations and reports because Lybrand, Ross had been for many years the regular auditors of HHM and were necessarily familiar with the accounting procedures and the records of HHM.

12. Upon the disclosure to us at the closing on September 11, 1959, that HHM had serious overdrafts in its bank balances and upon the discovery, as noted above, that HHM had suffered the severe operating loss of $206,953.51 between July 1, 1959, and September 11, 1959, I immediately secured the services of H. B. Maynard and Company, consulting engineers, to conduct a survey of operations in the HHM Hamilton plant. Thereafter, and in October of 1959, [fol. 222e] Maynard engineers commenced a survey of manufacturing techniques, worker efficiency, and managerial and supervisory competence in the HHM plant that engaged the attention of a corps of Maynard engineers for approximately six weeks. As a result of this survey, Maynard and Company prepared performance reports which indicated (1) manufacturing methods in the HHM plant were poorly conceived and inadequately supervised, (2) tooling and equipment lacked modern design and showed little in-

genuity or imagination, and (3) labor performance achieved only a level of 70-75% of normal as compared with the 93% of normal level of performance which the old HHM management had assumed to exist. Attached hereto is a Maynard report evaluating and summarizing the results of the above described survey.

Frank D. Robinson.

Subscribed and sworn to before me this 9th day of January, 1961.

Elwood C. Wilson, Notary Public, State of Ohio.
My Commission Expires Oct. 13, 1962. (Seal.)

[fol. 360]

Exhibit 1

Herring-Hall-Marvin Safe Company

Amount of Overdrafts on the First Nat'l. Bank of Hamilton and on Total Bank Balances

January 2nd through September 10, 1959

Date	Overdraft on First Nat'l. Bank of Hamilton	Overdraft on Total Bank Balances
1/ 6/59	$ 5,931 62	
1/14/59	25,810 92	
1/15/59	16,627 87	
2/25/59	12,196 93	
3/ 4/59	23,125 71	
3/ 5/59	1,742 95	
3/17/59	14,741 14	
3/20/59	13,562 64	
3/25/59	43,556 05	
4/ 6/59	12,768 22	
4/ 7/59	26,627 44	
4/ 8/59	31,026 00	
4/10/59	52,528 44	$33,060 71
4/13/59	5,234 44	
4/14/59	1,517 73	
4/15/59	32,158 05	6,698 03
4/16/59	27,454 97	4,462 61
4/17/59	42,556 96	21,290 99
4/20/59	53,327 98	26,485 05
4/21/59	65,818 83	37,655 76
4/22/59	28,732 29	5,873 14
4/30/59	51,157 97	35,549 13
5/ 1/59	32,515 33	21,886 93
5/ 4/59	67,700 95	57,072 55
5/ 5/59	78,394 58	66,890 68
5/ 6/59	28,157 70	16,653 80
5/ 7/59	38,551 37	25,712 35
5/ 8/59	40,945 53	29,252 27
5/11/59	68,318 75	55,633 95
5/12/59	66,144 39	53,102 67
5/13/59	51,909 49	37,982 19
5/28/59	26,288 89	10,361 72
6/10/59	22,440 40	
6/16/59	4,024 80	
6/17/59	104 51	
6/18/59	6,693 53	
6/19/59	34,002 10	1,123 72
6/22/59	24,432 73	
6/23/59	20,251 24	
6/26/59	67,799 18	28,046 25

[fol. 361] **EXHIBIT I—Continued**

Date	Overdraft on First Nat'l. Bank of Hamilton	Overdraft on Total Bank Balances
7/ 1/59	27,549.93	
7/ 2/59	49,967.41	
7/ 7/59	40,207.58	$23,486.66
7/ 8/59	46,483.65	19,894.62
7/ 9/59	37,700.21	10,755.00
7/10/59	31,064.51	4,069.27
7/13/59	92,943.22	65,947.98
7/14/59	42,560.56	15,554.76
7/15/59	25,354.96	
7/16/59	21,863.70	
7/21/59	17,746.77	
7/22/59	16,829.81	
7/23/59	20,881.76	
7/24/59	49,632.18	7,444.88
7/27/59	16,482.28	
7/28/59	66,637.98	49,773.94
7/30/59	1,731.94	
8/ 3/59	1,140.77	
8/ 4/59	21,679.32	6,626.50
8/ 5/59	25,904.02	10,388.85
8/ 6/59	40,516.98	27,133.15
8/ 7/59	30,784.00	11,400.17
8/10/59	53,878.12	37,211.73
8/11/59	72,651.92	54,279.14
8/12/59	47,984.26	29,611.48
8/13/59	34,884.01	
8/18/59	4,807.54	
8/25/59	9,136.91	
8/26/59	27,692.24	
8/27/59	33,954.76	
8/28/59	16,313.63	
8/31/59	6,410.07	
9/ 2/59	69,173.37	20,195.91
9/ 3/59	74,969.02	25,991.56
9/ 4/59	78,670.12	47,692.66
9/ 8/59	47,976.17	27,618.90
9/ 9/59	54,446.90	40,885.74
9/10/59	55,819.63	41,837.65

EXHIBIT A

Herring-Hall-Marvin Safe Company

Balance Sheet, April 30, 1959

Assets			Liabilities			
Cash on hand and demand deposits		$ 115,507.32	Notes payable—banks			$ 250,000.00
Notes and accounts receivable:			Accounts payable:			
Trade	$1,479,785.07		Trade		$ 431,146.45	
Other	39,850.17		Other		146,852.20	
	1,519,635.24					577,998.65
Less, allowance for doubtful accounts	35,000.00					
		1,484,635.24				
Inventories, less partial payments received on contracts in process		1,642,558.70	Accrued expenses			802,305.20
Prepaid expense		50,205.70	Provision for Federal taxes on income			102,187.67
Total current assets		3,292,906.96	Total current liabilities			1,732,491.52
			Notes payable—other (non-current)			2,000.11
			Capital			
			Common capital stock, $1 par value; 20,000 shares authorized, 13,450 shares issued, less 7,560 shares in treasury, outstanding 5,890 shares		5,890.00	
Land, buildings and equipment, at cost in cash, or in capital stock	2,689,667.27		Surplus:			
Less, allowance for depreciation	2,035,236.69		Paid-in	$ 59,564.32		
		654,430.58	Earned:			
			Balance, July 1, 1958	$2,059,597.92		
			Net income for ten months ending April 30, 1959	96,633.17		
				2,156,231.09		
Patents		1.00	Less dividends paid	8,838.50		
					2,147,392.59	
					2,206,956.91	
						2,212,346.91
		$3,947,338.54				$3,947,338.54

[fol. 363] EXHIBIT B

Herring-Hall-Marvin Safe Company

Report No. 1

Report upon Review of Certain Accounts and Records as of various dates during 1959

[fol. 364] LYBRAND, ROSS BROS. & MONTGOMERY
Certified Public Acountants

December 8, 1960

Mr. F. D. Robinson,
Vice President and Treasurer
Diebold, Incorporated,
Canton 2, Ohio.

DEAR MR. ROBINSON:

In accordance with your request, we have reviewed certain accounts and records of Herrin-Hall-Marvin Safe Company as of various dates during the year 1959. The general scope of our review and our findings are as follows:

Cash: We either reviewed the Company's bank reconciliations, or prepared our own reconciliations of all bank accounts as of the following dates:

Aprjl	30, 1959
May	1, 1959
May	8, 1959
May	15, 1959
May	22, 1959
May	29, 1959
September	10, 1959

We are able to satisfy ourselves as to the substantial correctness of all reconciling items except the amount of outstanding checks of the First National Bank and Trust Co.—Hamilton account.

[fol. 365] The exception with respect to outstanding checks is due to the fact that the Company followed the procedure of preparing checks in payment of invoices at

the time invoices were approved, but of not releasing them until later. No detail is available of the checks not yet released, or of those released and still outstanding, as of the respective dates.

We confirmed by direct correspondence with the depositaries all bank balances as of April 30, 1959, and September 10, 1959.

The cash balances shown by the books and the corrected balances for the dates of April 30, 1959 and September 10, 1959, are shown in the accompanying Schedule A. The difference between the "cash" shown on the balance sheet of the Company's interim financial statements as of April 30, 1959 and the "corrected cash balance", as of that date, is explained in detail in Schedule B.

We traced all transfers between banks for the period April 27 to May 5, 1959, inclusive.

In addition to the above, we reconciled the Regular Account at First National Bank & Trust Co.—Hamilton as of June 30, 1959 and September 3, 1959. We confirmed, by direct correspondence with the depositaries, the bank balances as of these dates. A summary of the reconciliations are as follows:

	June 30	September 3
Balance per bank	$191,593 92	$ 13 92
Deposits in transit	24,319 03	39,958 39
	215,912 95	39,972 31
Less:		
Outstanding checks	174,800 75	113,100 29(b)
Miscellaneous reconciling items, net	5,169 99	
Balance per books, before audit adjustment	*35,942 21*	*73,127 98*
Audit adjustment	46,858 62(a)	
Corrected book balance	*$ 10,916 41*	*$ 73,127 98*

* Clerk's Note—All figures appearing in this exhibit in italics indicate "red" figures.

[fol. 366] (a) Represented checks released prior to July 1, 1959, but not recorded in the general ledger prior to that date.

(b) We had no way of satisfying ourselves as to the substantial correctness of this amount.

due to the Company's procedure with respect to the preparing and releasing of checks, as more fully described on page 1 of this letter.

The Company's cash position is shown in Schedule C for the following dates:

May 1, 1959
May 8, 1959
May 15, 1959
May 22, 1959
May 29, 1959

In addition to the total cash position Schedule C reflects the following:

a) Reimbursement of the payroll account subsequent to the date that payroll checks were given to the employees.
b) The balance in the General account after reflecting the reimbursement of the Payroll bank account.

Cash surrender value of life insurance: The cash surrender values of the Company's life insurance policies, as reflected by the general ledger as of April 30, 1959 and the amounts borrowed against such policies as of that date, are set forth in Schedule D.

[fol. 367] We have not confirmed with the various insurance companies, either the cash surrender values, or the related borrowings.

Accounts payable: We satisfied ourselves as to the substantial correctness of the aging of accounts payable as of September 11, 1959 as prepared by employees of Diebold, Incorporated.

In connection with this phase of our work we examined invoices in support of approximately 92% of the total dollar amount of accounts payable.

A summary of the aging is shown in the accompanying Schedule E.

Cash advances from Diebold, Incorporated: We analyzed the cash advances, as reflected in the inter-division control account and traced the amounts to deposit in the First

National Bank & Trust Co.—Hamilton for the period September 11 to October 22, 1959, inclusive.

The detail of these advances is set forth in Schedule F.

Advance payments on sales contracts in process: The aggregate of advance payments as shown by the general ledger for the following dates are:

April 30, 1959	$187,775.00
June 30, 1959	306,188.00
September 11, 1959	393,904.00

General: If you wish to discuss further, any of the matters included in this report, or have need of additional information, please let us know.

Very truly yours, Lybrand, Ross Bros. & Montgomery.

[fol. 368]

SCHEDULE A

Cash Balances at April 30, 1959 and September 10, 1959

Per general ledger:			April 30		September 30
Petty cash			$ 2,100 00		$ 2,100 00
Cash in banks:					
First National Bank & Trust Co.—Hamilton					
Regular disbursement			*4,254 39*		*53,978 59*
Regular payroll			800 00		800 00
Special payroll			500 00		500 00
Irving Trust Co.			7,160 01		2,015 84
Continental Illinois National Bank & Trust Co.			1,524 65		1,127 56
First National Bank of Boston			1,000 00		1,000 00
Peoples First National Bank & Trust Co.			6,477 90		9,477 90
Wells Fargo Bank			90 88		799 97
Toledo Trust Co.			555 75		508 19
Chase Manhattan Bank			52 52		52 52
			15,507 32		*35,596 61*
Less disbursements not recorded in general ledger:					
Regular payroll		$20,000 00		$350 83	
Special payroll		8,165 36		165 36	
			28,165 36		516 19
Corrected cash balance			*$12,658 04*		*$36,112 80*

[fol. 369] SCHEDULE B

Reconciliation of Cash Per Interim Statement with Actual Cash Balance – April 30, 1959

Cash per interim Company financial statement, attached as exhibit to purchase contract dated July 17, 1959		$115,507 32
Less:		
Unsupported reclassification from accounts receivable to cash, not recorded on books of account (work sheet reclassification only)	$100,000 00	
April, 1959 payroll disbursements not recorded in general ledger until May, 1959	28,165 36	
Total deductions		128,165 36
Corrected actual cash balance, April 30, 1959		$ 12,658 04

[fol. 370]

SCHEDULE C

Net Amount of Regular Payroll; Reimbursement of Payroll Account; and Book Balances

Month of May, 1959

1959	Net amount of regular payroll	Reimbursement of payroll account	Book Balances: First National Bank & Trust Co. (Hamilton) General account	First National Bank & Trust Co. (Hamilton) Regular payroll account	First National Bank & Trust Co. (Hamilton) Special payroll account	Irving Trust Co.	Continental Illinois National Bank & Trust Co.	First National Bank of Boston	Peoples First National Bank & Trust Co.	Wells Fargo Bank	Toledo Trust Co.	Chase Manhattan Bank	Total all Banks
May 1.....		$20,000.00											
1.....	$51,047.66	6,047.66	$ 42,800.21	$44,200.00	$3,665.36	$ 1,926.70	$1,524.65	$1,000.00	$6,477.90	$ 90.88	$555.75	$52.52	$ 79,037.17
4.....		20,000.00	77,985.83										
5.....		10,000.00	116,809.86										
6.....		10,000.00	88,442.58										
7.....		5,000.00	88,551.37										
		51,047.66											
8.....	38,375.15	8,277.63	40,945.53	29,297.52	334.64	2,005.42	2,400.15	1,000.00	6,477.90	90.88	555.75	52.52	57,325.29
11.....		10,000.00	68,318.75										
12.....		10,000.00	66,144.39										
13.....		10,000.00	51,909.49										
		38,277.63											
15.....	81,108.16	26,108.16	49,302.20	54,297.52	7,665.36	2,680.46	2,757.07	1,000.00	6,477.90	377.54	555.75	52.52	1,240.56
18.....		20,000.00	81,547.49										
19.....		20,000.00	53,601.19										
20.....		15,000.00	60,251.47										
		81,108.16											
22.....	37,615.94	12,447.17	68,130.08	24,466.29	334.64	5,042.13	4,064.49	1,000.00	6,477.90	377.54	555.75	52.52	61,568.76
25.....		10,000.00	20,318.83										
26.....		10,000.00	10,543.63										
27.....		5,000.00	8,312.64										
		37,447.17											
28.....		32,768.08											
29.....	82,615.81		133,718.27	49,514.02	6,665.36	13,636.36	4,794.26	1,000.00	6,477.90	286.01	555.75	52.52	104,541.69
June 1.....		20,114.02											
2.....		20,000.00											
3.....		10,000.00											
		82,882.10											

[fol. 371]

SCHEDULE D

Schedule of Insurance on Lives of Officers and Others April 30, 1959

	Aggregate Insurance Coverage	Cash Surrender Value per General Ledger
Warren F. Mosman	$ 850,000	$121,600 76
Harvey L. Henkel	100,000	15,151 00
Howard Edwards	100,000	7,822 67
	$1,050,000	
Total cash surrender value		144,574 43
Less, amount of borrowings against policies		141,662 50
Net cash surrender value, April 30, 1959		$ 2,911 93

[fol. 372]

SCHEDULE E

Aging of Accounts payable as of September 11, 1959

Due Date		Amount	Percent
Current		$499,833 66	66 47
Past due:			
September 1 to September 11	$ 48,461 32		6 45
August	118,105 99		15 71
July	39,935 15		5 31
June	4,362 08		.58
May	7,072 66		.94
April	3,251 82		.43
March	14,059 28		1 87
February	2,853 55		.38
January	4,145 97		.55
Prior to January 1, 1959	1,879 86		.25
		244,127 68	32 47
Invoices unlocated		7,996 10	1 06
Total accounts payable, September 11, 1959		$751,957 44	100 00

[fol. 372a]

SCHEDULE F

Cash Advanced to Herring-Hall-Marvin Safe Company by Diebold, Incorporated

September 11, 1959 to October 22, 1959

Bank in which deposited:	Date deposited	Amount
First National Bank & Trust Co.—Hamilton	September 15, 1959	$200,000 00
First National Bank & Trust Co.—Hamilton	September 28, 1959	300,000 00
Peoples First National Bank & Trust Co. (now Pittsburgh National)	October 22, 1959	3,801 90
Total cash advanced		$503,801 90

[fol. 373] EXHIBIT "C"

Herring-Hall-Marvin Safe Company

Summary Schedules of Assets, Liabilities, Shareholders' Equity and Operations for periods ending December 31, 1944 through June 30, 1959

[fol. 374] Lybrand, Ross Bros. & Montgomery
Certified Public Accountants
Carew Tower
Cincinnati 2

December 2, 1960

Mr. F. D. Robinson,
Vice President and Treasurer,
Diebold, Incorporated,
Canton 2, Ohio.

DEAR MR. ROBINSON:

In accordance with your request we have prepared the following schedules regarding the Herring-Hall-Marvin Safe Company:

Summary of Statement of Assets as of the periods ended December 31, 1955 through June 30, 1959.

Summary of Statements of Liabilities and Shareholders' Equity as of the periods ended December 31, 1944 through June 30, 1959.

Summary of Statements of Retained Earnings for the periods ended December 31, 1944 through June 30, 1959.

Summary of Statements of Income for the periods ended December 31, 1944 through June 30, 1959.

The information included in the schedules, listed above, has been taken from the financial statements included in the company's published annual reports, some of which we have examined and others which we have not examined.

Due to the fact that we have not examined the Com-

pany's financial statements for all periods included, we are not in a position to express an opinion as to the fairness of the financial position and the result of operations, reflected by the schedules, taken as a whole.

If you wish any additional information, please let us know.

Very truly yours, Lybrand, Ross Bros. & Montgomery.

WKW:jg
DWH

[fol. 375]

Assets	December 31					
	1944	1945	1946	1947	1948	1949
Cash	$ 333,814	$ 56,243	$ 62,884	$ 97,256	$ 78,890	$ 44,905
Notes and accounts receivable	935,225	576,065	1,037,645	830,047	912,547	744,180
Less, allowance for doubtful accounts	(97,384)	(20,303)	(20,922)	(31,127)	(42,920)	(29,762)
Inventories, at the lower of cost or market	335,052	655,330	962,542	1,173,508	1,277,109	943,945
Less, advance payments on contracts	(19,314)	(72,502)	(133,020)	(191,749)	(224,072)	(45,732)
Prepaid expenses	12,818	17,809	13,365	19,061	26,623	31,830
Total current assets	1,500,211	1,212,642	1,922,494	1,896,996	2,028,177	1,689,366
Cash surrender value of life insurance						
Notes and accounts receivable noncurrent	674,523	426,272				
Investments, principally subsidiary companies	3,516	4,125	4,903	21,534	1,062	71,139
Cash held by trustee for redemption of first mortgage 5% bonds		5,685	5,685	5,685	5,684	8,575
Patents						4,563
Land, buildings and equipment, at cost in cash or in the company's capital stock	1,302,149	1,471,025	1,832,535	2,058,243	2,186,346	2,249,522
Less, allowances for depreciation	(1,052,800)	(1,086,241)	(1,148,257)	(1,195,126)	(1,281,374)	(1,384,431)
	$2,427,599	$2,033,508	$2,617,360	$2,787,332	$2,939,895	$2,638,734

[fol. 376]

Herring-Hall-Marvin Safe Company

Summary of Statements of Assets as of the period ended December 31, 1944 through June 30, 1959
(see comments in accompanying letter of transmittal)

	June 30									
1950(a)	1951	1952	1953	1954	1955	1956	1957	1958	1959
$ 93,934	$ 150,219	$ 176,191	$ 132,133	$ 140,942	$ 254,816	$ 287,074	$ 230,538	$ 213,648	$ 142,522
849,366	982,300	698,569	951,670	985,159	1,147,768	1,428,847	1,644,912	1,510,009	1,489,564
(19,977)	(21,686)	(30,648)	(27,250)	(25,692)	(24,769)	(25,000)	(25,000)	(25,000)	(25,000)
948,558	1,106,514	1,193,726	1,043,333	1,234,399	1,361,642	1,488,709	1,833,652	1,644,598	1,306,342
(122,699)	(187,057)	(90,111)	(123,738)	(185,188)	(220,144)	(363,714)	(363,310)	(272,849)	(306,189)
31,836	19,181	56,567	57,273	47,214	52,140	32,337	40,909	37,053	41,258
1,781,018	2,049,471	2,004,294	2,033,421	2,196,834	2,571,453	2,848,253	3,361,701	3,107,459	3,248,497
		5,211	16,002	29,206	46,900	71,710	109,743	141,574	177,976
			1,564	1,377					51,576
77,935	45,897	83,377	308,802	212,413	161,238	162,104	160,927	197,376	6,081
8,575									
4,863	5,810	1	1	1	1	1	1	1	1
2,252,727	2,319,112	2,477,469	2,566,323	2,658,445	2,878,954	2,958,315	2,823,990	2,822,827	2,746,714
(1,435,870)	(1,528,364)	(1,624,058)	(1,723,317)	(1,830,230)	(1,937,893)	(2,014,275)	(1,934,208)	(2,000,889)	(1,986,662)
$2,689,248	$2,891,926	$2,946,294	$3,202,796	$3,268,046	$3,720,653	$4,026,108	$4,522,154	$4,271,348	$4,244,183

(a) Company changed from calendar year to fiscal year closing.

[fol. 377]

Liabilities	December 31 1944	1945	1946	1947	1948	1949
Notes payable, banks and others	$1,180,000	$1,072,392	$1,315,558	$1,119,234	$1,129,679	$1,057,580
Accounts payable, trade and other	350,899	225,513	351,679	310,425	291,724	206,587
Accrued expenses	74,475	97,792	214,303	202,599	220,876	207,661
First mortgage, current portion of principal payments						
Provision for federal income taxes	62,142	56,831	211,000	301,000	127,612	
Total current liabilities	1,667,516	1,452,528	2,092,540	1,933,258	1,769,891	1,471,828
Note payable bank, noncurrent portion	635,000	388,211				
First mortgage, noncurrent portion						
Shareholders' Equity						
Common capital stock	328,000	328,000	328,000	328,000	328,000	328,000
Capital surplus	51,289	51,289	51,289	51,289	51,289	51,289
Reserve for contingencies	40,500	46,500			10,056	
Earnings retained in the business, as annexed	*294,706**	*283,020*	145,531	474,785	780,659	787,617
	$2,427,599	$2,033,508	$2,617,360	$2,787,332	$2,939,895	$2,638,734

Clerk's Note.

* All figures and words italicized in this exhibit indicate "red" figures or letters.

[fol. 378]

Herring-Hall-Marvin Safe Company

Summary of Statements of Liabilities and Shareholders' Equity as of the periods ended December 31, 1944 through June 30, 1959
(see comments in accompanying letter of transmittal)

	June 30									
1950(a)	1951	1952	1953	1954	1955	1956	1957	1958	1959
$ 933,000	$ 200,000		$ 400,000	$ 450,000	$ 512,000	$ 467,741	$ 635,826	$ 633,148	$ 297,865
180,996	240,614	$ 268,901	415,949	562,705	704,725	574,254	879,555	536,977	696,072
357,947	432,184	438,819	386,050	464,025	508,278	579,029	671,087	689,818	713,303
	84,000	84,000	84,000	84,000	101,873	100,571	84,000	35,000	
16,000	246,000	386,000	82,400	88,961	89,951	332,821	218,943	214,038	223,502
1,487,943	1,202,798	1,177,720	1,368,399	1,649,691	1,916,827	2,051,419	2,489,411	2,108,981	1,930,742
					59,672	66,865	41,871	35,865	
	539,000	455,000	371,000	287,000	219,571	119,000	35,000		
328,000	6,227	6,155	6,104	5,962	5,943	5,939	5,936	5,898	5,890
51,289	98,639	91,636	86,505	70,777	68,472	67,836	67,314	61,006	59,564
822,016	1,045,262	1,215,783	1,370,788	1,254,616	1,450,168	1,712,049	1,882,622	2,059,598	2,247,987
$2,689,248	$2,891,926	$2,946,294	$3,202,796	$3,268,046	$3,720,653	$4,026,108	$4,522,154	$4,271,348	$4,241,183

(a) Company changed from calendar year to fiscal year closing.

[fol. 379]

	December 31					
	1944	1945	1946	1947	1948	1949
Balance at beginning of period	*$385,144*	*$294,706*	*$233,020*	$145,531	$474,785	$780,659
Net income, *loss*	90,438	61,686	332,051	329,254	306,954	*4,550*
Reversal of provision for reserve for contingencies			46,500			
Adjustment applicable to prior year					(1,080)	
Adjustment to restore investment in subsidiary company to cost						10,056
Costs of patents pending, year 1948						2,732
Adjustment for under-provision for federal taxes on income, year 1948						(1,280)
Provision to reduce investments in and advances to subsidiaries, to estimated realizable value						
Profit on sale of Quickdraft division, less applicable federal income tax						
Loss on liquidation of subsidiaries, less applicable federal income tax						
Adjustment of property, plant and equipment and related depreciation allowance (to conform to report of Internal Revenue Service), less applicable federal income tax						
Profit on sale of Remington division, less applicable federal income tax						
Loss on sale of Canadian subsidiary						
Dividends	-0-	-0-	-0-	-0-	-0-	-0-
Balance at end of period	*$294,706*	*$233,020*	$145,531	$474,785	$780,659	$787,617

[fol. 380]

Herring-Hall-Marvin Safe Company

Summary of Statements of Retained Earnings for the periods ending December 31, 1944 through June 30, 1959
(see comments in accompanying letter of transmittal)

	June 30								
1950(a)	1951	1952	1953	1954	1955	1956	1957	1958	1959
$787,617	$ 822,016	$1,045,262	$1,215,783	$1,370,788	$1,254,616	$1,450,168	$1,712,049	$1,882,622	$2,059,598
34,399	204,054	182,916	167,276	209,790	106,998	273,763	182,449	188,814	187,603
				(314,000)					
					49,213				
					(10,406)				
	25,468				61,640				
									37,810
-0-	(6,276)	(12,395)	(12,271)	(11,962)	(11,893)	(11,882)	(11,876)	(11,838)	(25,240) (11,784)
$822,016	$1,045,262	$1,215,783	$1,370,788	$1,254,616	$1,450,168	$1,712,049	$1,882,622	$2,059,598	$2,247,987

(a) Company changed from calendar year to fiscal year closing.

[fol. 381]

	December 31					
	1944	1945	1946	1947	1948	1949
Net sales	$1,157,967	$2,434,331	$4,340,353	$5,780,882	$5,881,498	$5,023,270
Cost of Sales	953,468	1,957,059	3,103,153	4,117,518	4,288,351	3,989,059
Gross profit on sales	204,499	477,272	1,237,200	1,663,364	1,593,147	1,034,211
Gross profit percentage	17.7%	19.6%	28.5%	28.8%	27.1%	20.6%
Selling, general and administrative expenses	144,913	348,562	645,903	969,048	1,118,295	1,009,738
	59,586	128,710	591,297	694,316	474,852	24,473
Other income	144,820	51,566	5,288	1,324	37,297	6,901
	204,406	180,276	596,585	695,640	512,149	31,374
Other expenses	55,255	66,034	53,534	66,184	77,583	44,235
Income, *loss*, before federal income taxes	149,151	114,242	543,051	629,456	434,566	*12,861*
Provision for federal income taxes	58,713	52,556	211,000	300,202	127,612	*8,311*
Less, refundable federal income taxes for prior year arising from carry-back of unused excess profits credit						
Net income, *loss*	$ 90,438	$ 61,686	$ 332,051	$ 329,254	$ 306,954	$ *4,550*

[fol. 382]

Herring-Hall-Marvin Safe Company

Summary of Statements of Income for the periods ending December 31, 1944 through June 30, 1959
(see comments in accompanying letter of transmittal)

				June 30					
1950(a)	1951	1952	1953	1954	1955	1956	1957	1958	1959
$2,583,111	$6,433,260	$6,700,629	$6,443,856	$6,898,633	$7,207,862	$9,231,984	$10,672,279	$10,301,560	$10,023,199
1,997,024	4,977,748	4,991,805	4,951,422	5,175,650	5,459,256	6,991,907	8,380,904	7,891,225	7,608,213
586,087	1,455,512	1,708,824	1,492,434	1,722,983	1,748,606	2,243,977	2,291,375	2,407,335	2,414,986
22.7%	22.6%	25.5%	23.2%	25.0%	24.3%	24.3%	21.5%	23.4%	24.1%
521,312	939,285	1,244,484	1,272,189	1,430,877	1,566,831	1,631,193	1,880,063	1,995,603	2,023,150
64,775	516,227	464,340	220,245	292,106	181,775	699,784	411,312	411,732	*391,836
5,676	15,219	17,122	33,746	6,808	3,946	21,283	10,936	12,641	/ 12,037
70,451	531,446	481,462	253,991	298,914	185,721	631,067	452,248	454,373	433,873
20,052	74,958	23,384	16,721	38,124	30,323	39,304	43,799	43,359	24,470
50,399	456,488	458,078	187,270	260,790	155,398	591,763	408,449	411,014	409,403
16,000	252,434	275,162	(b) 12,076	(b) 51,000	(b) 48,400	318,000	226,000	222,200	221,800
			(22,082)						
$ 34,399	$ 204,054	$ 182,916	$ 167,276	$ 209,790	$ 106,998	$ 273,763	$ 182,449	$ 188,814	$ 187,603

(a) Company changed from calendar year to fiscal year closing.
(b) Provision for federal income taxes based on the joining with subsidiaries in filing consolidated tax return.

[fol. 383] EXHIBIT "D"

Herring-Hall-Marvin Safe Company

Comparison of Company Statistical Data with that of Industry as of June 30, 1951 through 1959

[fol. 384] Lybrand, Ross Bros. & Montgomery
Certified Public Accountants
Carew Tower
Cincinnati 2

January 3, 1961

Mr. F. D. Robinson,
Vice President and Treasurer,
Diebold, Incorporated,
Canton 2, Ohio.

DEAR MR. ROBINSON:

In accordance with your request, we submit in the accompanying schedules certain statistical information regarding Herring-Hall-Marvin Safe Company as of June 30, 1951 through 1959, inclusive, as compared to like statistical information of the metal fabricating industry.

If we can be of further assistance, please let us know.

Very truly yours, Lybrand, Ross Bros. & Montgomery.

WKW:jg
DWH

[fol. 385]

Herring-Hall-Marvin Safe Company

Comparison of Company Statistical Data with that of Industry as of June 30, 1951 through 1959

	June 30								
	1951	1952	1953	1954	1955	1956	1957	1958	1959
Herring-Hall-Marvin Safe Company:									
Current assets	$2,049,471	$2,004,294	$2,033,421	$2,196,834	$2,571,453	$2,848,253	$3,361,701	$3,107,459	$3,248,497
Current liabilities	$1,202,798	$1,177,720	$1,368,399	$1,649,691	$1,916,827	$2,054,419	$2,489,411	$2,108,981	$1,930,742
Current ratio (a)	1.70	1.70	1.48	1.33	1.34	1.38	1.35	1.47	1.68
Industry:									
Current ratio (b)	2.55	2.56	3.71	2.70	2.60	2.53	2.51	2.76	2.46

Notes:

(a) The current ratio was determined by dividing the amount of current liabilities into the amount of current assets.

For detail of the Company's current assets and current liabilities, reference is made to "report" dated December 19, 1960 and entitled:

"Summary Schedules of Assets, Liabilities, Shareholders' Equity and Operations for the periods ending December 31, 1944 through June 30, 1959".

(b) Information taken direct or computed from "Quarterly Financial Report for Manufacturing Corporations" of the Federal Trade Commission—Securities and Exchange Commission, as follows:

(1) For the years 1951–57, inclusive, from information classified "Fabricated Metal Products."
For the years 1958–59, inclusive, from information classified "Other Fabricated Metal Products."

(2) For the years 1951–54, inclusive, ratios have been computed from dollar amounts shown.
For the years 1955–59, inclusive, ratios have been taken direct.

[fol. 386]

Herring-Hall-Marvin Safe Company

Comparison of Comapny Statistical Data with that of Industry as of June 30, 1951 through 1959

	June 30								
	1951	1952	1953	1954	1955	1956	1957	1958	1959
Herring-Hall-Marvin Safe Company:									
Quick assets	$ 150,219	$ 176,191	$ 132,133	$ 140,942	$ 254,816	$ 287,074	$ 230,538	$ 213,648	$ 142,522
Current liabilities	$1,202,798	$1,177,720	$1,368,399	$1,649,691	$1,916,827	$2,054,419	$2,489,411	$2,108,981	$1,930,742
Quick ratio (a)	.12	.15	.10	.09	.13	.14	.09	.10	.07
Industry:									
Quick ratio (b)	.71	.62	.51	.54	.51	.40	.38	.46	.37

Notes:

(a) The quick ratio was determined by dividing the amount of current liabilities into the amount of quick assets.

Quick assets for the purpose of determining the above statistical information include the following:

Cash
U. S. Government securities (company owned no U. S. Government securities for any of the above dates).

(b) Note (b) of page 1 is incorporated in this schedule by reference.

[fol. 387]

Herring-Hall-Marvin Safe Company

Comparison of Company Statistical Data with that of Indistry as of June 30, 1951 through 1959

	June 30								
	1951	1952	1953	1954	1955	1956	1957	1958	1959
Herring-Hall-Marvin Safe Company:									
Total assets	$2,891,926	$2,946,294	$3,202,796	$3,268,046	$3,720,653	$4,026,108	$4,522,154	$4,271,348	$4,244,183
Total liabilities	$1,741,798	$1,632,720	$1,739,399	$1,936,691	$2,196,070	$2,240,284	$2,566,282	$2,144,846	$1,930,742
Percent of total liabilities to total assets (a)	60.2	55.4	54.3	59.3	59.0	55.6	56.7	50.2	45.5
Industry:									
Percent of total liabilities to total assets (b)	31.6	33.4	34.9	32.7	33.4	35.3	35.3	33.6	36.5

Notes:

(a) The percent of total liabilities to total assets was determined by dividing the amount of total assets into the amount of total liabilities.

For detail of the Company's total assets and total liabilities, reference is made to "report" dated December 19, 1960 and entitled:

"Summary Schedules of Assets, Liabilities, Shareholders' Equity and Operations for the periods ending December 31, 1944 through June 30, 1959."

(b) Note (b) of page 1 is incorporated in this schedule by reference.

[fol. 388] AN APPRAISAL OF THE MANUFACTURING CAPABILITIES OF THE HERRING-HALL-MARVIN SAFE COMPANY, HAMILTON, OHIO

Purpose:

The purpose of this report is to summarize our appraisal of the manufacturing capabilities and effectiveness of the Herring-Hall-Marvin Safe Company.

Background:

In October 1959 we met with key executives of Diebold, Incorporated, and the Herring-Hall-Marvin Safe Company to discuss a proposed survey of the manufacturing function of the Herring-Hall-Marvin Safe Company.

At this meeting, Mr. F. D. Robinson, Vice President and Treasurer of Diebold, Incorporated, reviewed with us certain manufacturing performance reports. These reports indicated that the direct labor efficiency of the plant was about 92 percent of standard. Further, it was brought out that this performance level was being obtained under straight day work conditions, without the benefit of any financial incentives.

It was then explained that the Diebold executive personnel were gravely concerned over the high level of performance indicated by these reports. If the reports truly reflected manufacturing performance, it meant that very little cost reduction could be expected through improvement in direct labor efficiency. It was also stated that a very substantial reduction in manufacturing costs was necessary [fol. 389] to place the Herring-Hall-Marvin Safe Company on a profitable basis.

At this time, we proposed that our firm be engaged to conduct an audit, or appraisal, of the effectiveness of the direct labor operations and evaluate the validity of the 92 percent performance recorded in past production reports. We were also to provide recommendations on what steps should be taken to effect substantial reductions in manufacturing costs.

Shortly after this meeting, our proposal for the study outlined above was accepted by Diebold, Incorporated, and our study began on December 14, 1959. It continued for

about six weeks and was completed on or about January 25, 1960.

Subsequently, in the spring and summer of 1960, we were again employed to assist in the training and management development of Herring-Hall-Marvin foremen and supervisory group. We also, at this time, conducted specialized technical training in methods engineering techniques for a group of time study personnel.

Based upon the knowledge gained during the course of our original survey and our subsequent training and management development work, we feel well-qualified to provide a professional opinion on the manufacturing capability and efficiency of the Herring-Hall-Marvin Safe Company in existence at about the time of its sale to Diebold, Incorporated.

[fol. 390] Findings:

Our findings on the performance level of the direct labor operations indicated that the true level of performance was only 70 to 75 percent of standard, as compared to the 92 percent reported on control reports.

A detailed examination of the time standards indicated that they did not accurately measure labor performance in that they provided more time than necessary to perform an operation. There was very loose control on manufacturing methods and the standards were seldom revised to reflect improvements in method. There was also very poor control on the reporting of time on a job and number of pieces produced. In addition to these weaknesses, the time study personnel were accustomed to granting arbitrary allowances of extra time. This practice further inflated the reported performance level.

While the primary emphasis of this study was to determine the validity of the performance reports, considerable time was also devoted to an analysis of manufacturing methods, processing, tooling, equipment and supervisory personnel.

In general, manufacturing methods were poorly conceived. The foremen received little guidance or assistance from methods engineering or production engineering personnel. Frequently, the method was determined solely by the operator. Tooling and equipment were adequate to

produce acceptable quality work, but were quite ordinary in design and showed little ingenuity or imagination.

Supervisory personnel possessed the basic qualities desired for this type of work, but had received little or no basic training in supervisory duties and were badly in need of management development.

[fol. 391] As a result of this study, we are firmly convinced that very substantial cost reductions can be initiated in the Hamilton plant. More specifically, we believe that the direct labor payroll alone can be reduced by approximately $500,000 per year.

Conclusion:

On the basis of the findings outlined above, there is little question but that the manufacturing capability of the company was extremely poor. It was without question a high-cost producer and a marginal manufacturing facility. This condition was verified by all of the areas of manufacturing surveyed by our personnel.

The measures of manufacturing effectiveness employed were completely misleading and tended to provide the management of the plant with a feeling of complacency and well being that was entirely false.

The manufacturing methods, processing, equipment, tooling and operations employed in the plant were well below the average of acceptable practice in the metal working industries. Currently accepted practices of inventory management, production control and quality control were very little in evidence.

The manufacturing personnel had been long dominated by a strong-willed individual with an extremely limited manufacturing background. The manufacturing management group demonstrated very little imagination, initiative, or creativeness, and were badly in need of development. [fol. 392] Under these conditions, it is our professional opinion that from a manufacturing standpoint, Herring-Hall-Marvin Safe Company was very poorly organized and operated. It was clearly a high-cost producer and could exist only as a marginal operation. It would require a very favorable pricing situation to operate on a profitable

basis. It would be hard pressed to survive under close pricing conditions or in a highly competitive market.

H. B. Maynard and Company, Incorporated, 718 Wallace Avenue, Pittsburgh 21, Pennsylvania.

December 6, 1960

[fol. 393] AFFIDAVIT OF RAYMOND KOONTZ

COUNTY OF STARK,
State of Ohio, ss:

RAYMOND KOONTZ, being duly sworn, deposes and says:

1. At the time the purchase of the assets of the Herring-Hall-Marvin Safe Company (HHM) was consummated on September 11, 1959, representatives of Diebold at the closing were shocked to discover that HHM had drawn checks in excess of its bank balances in the amount of $36,112.80. Consequently, it immediately became necessary for Diebold to advance funds in the amount of $200,000 to cover past due obligations of HHM, including an overdraft in the First National Bank and Trust Company of Hamilton, Ohio, in the amount of $53,978.59. Subsequently, it was discovered that during substantial periods of time during the calendar year of 1959, HHM had also drawn checks in substantial excess of its bank balances, reflecting that the working capital of the company had been seriously depleted and that the company had been in an extremely precarious financial condition. Examination of the books of HHM after September 11, 1959, also disclosed that the company had accumulated past-due trade bills dating back to January 1959 in the amount of $244,000. Indeed, the overdrafts and over-due trade bills demon-[fol. 394] strated conclusively that HHM was not able during most of 1959 prior to September 11, 1959, to meet its obligations as they matured. As a result of the grave financial situation which Diebold inherited from HHM, Diebold was compelled to advance cash in the amount of $503,801.90 to the HHM Division during the period between September 11, 1959, and October 22, 1959.

2. This serious financial condition of HHM raised grave questions as to the efficiency and profitability of the HHM operations. We immediately called in H. B. Maynard and Company, management consultants, to conduct a survey of operations in the Hamilton plant of HHM. Maynard engineers spent approximately six weeks in the plant surveying manufacturing techniques, worker efficiency, and managerial and supervisory competence. As a result of this survey, Maynard and Company prepared performance reports which indicated (1) manufacturing methods in the HHM plant were poorly conceived and inadequately supervised; (2) tooling and equipment lacked modern design and showed little ingenuity or imagination; and (3) labor performance achieved only a level of 70-75% of standard as compared with the 92-93% level of performance assumed to exist by the old HHM management. The Maynard report concluded that HHM was a high-cost producer which could exist only as a marginal operation and which could probably not survive in a highly competitive market. The survey indicated that substantial cost reductions could and should be immediately initiated in the HHM plant.

3. Those recommendations of the Maynard consultants which could be achieved without altering the physical assets [fol. 395] were carried out progressively by Diebold as rapidly as conditions would permit. Correction of many of the deficiencies found in the HHM plant by the Maynard engineers required a solution to the problem of the uneconomic Union contract which Diebold acquired from HHM. The Safe Workers Union had unwisely exploited its bargaining power and the precarious financial position of HHM (which couldn't afford to incur a strike) to force very low productivity and excessively high wage costs on the Hamilton plant. In March 1960, we began bargaining with the Union, seeking above all else to get improved productivity in this plant. The bargaining dragged on through March, April, May and June. We were finally forced to notify the Union that unless we could work out a contract which would give us reasonable productivity so as to make the plant competitive, the increasingly substantial losses were incurring in the operation of the plant would force us to close it. On July 7, 1960, the Union signed a two-year contract that (1) eliminated the arbitrary

wage escalator clause that had, in the past, resulted in uncontrolled inflation of costs, (2) removed the prior prohibitions on wage incentive plans and provided for a favorable wage incentive plan, and (3) gave us a two-year contract, thus avoiding the cost, time, and uncertainty of year to year bargaining.

4. Despite Diebold's best efforts, however, operations of the HHM Division continued during the first seven months of 1960 to reflect serious losses, culminating in a staggering loss of $106,000 for the month of July 1960.

5. Aggravating the grave deficiencies in manufacturing performance at the HHM plant has been a sharp loss in business by HHM. In the eight months ended August 31, [fol. 396] 1960, orders entered by the HHM Division declined $2,307,707, or 29.6% from the similar eight-month period of 1959. Excluding government orders, the decline in commercial business was even more severe, aggregating 40% under the first eight months of 1959. An even more prophetic barometer of the critical condition of the HHM Division is the fact that shipments for the first eight months of 1960 exceeded new orders by $449,000, or approximately 10%. Manifestly, no company can long exist if shipments continuously exceed new orders.

6. In addition to the other problems described above, the Mosler Safe Company, in late 1959 and early 1960, solicited away from HHM four of its key salesmen (Moser, Smith, Connelly, Jennings), and Safemaster (HHM's Washington, D. C., dealer), and bought control of the Hermann Safe Company (HHM's West Coast distributor). The Hermann Safe Company, in addition to being a manufacturer in its own right of bank protective equipment, (including bank vault doors), was the sole and exclusive West Coast sales outlet of the Herring-Hall-Marvin Safe Company. Unfortunately for Diebold, HHM bank products distributed through the Hermann Safe Company were labeled "Hermann" rather than "HHM". Therefore, the acquisition of the Hermann Safe Company by the Mosler Safe Company presented a doubly serious problem; Diebold had to start out from scratch on the entire West Coast to establish the name "Herring-Hall-Marvin" as well as to find new sales outlets.

7. As a result of the precarious financial condition of

HHM at the time of its acquisition by Diebold, as well as the continuing losses suffered in the operations of the plant at Hamilton, Diebold has been compelled to con-
[fol. 397] tinuously advance funds to meet the needs of HHM. By July 31, 1960, these advances aggregated $840,000.

8. Obviously Diebold cannot long support such a serious drain on its own financial resources. It is equally patent that the HHM plant cannot hope to continue as a substantial employer in the Hamilton area unless the economic health of the plant is quickly restored. Correction of many of the deficiencies found in the HHM plant by the Maynard engineers entails a revamping of production techniques and substantial modernization of the plant and equipment. Accordingly, if the HHM plant is to be preserved as a productive unit and a substantial employer in the Hamilton area, it is imperative that Diebold be free to proceed to inaugurate such modernization and rearrangement of plant and equipment, together with the removal of obsolete equipment, as is necessary to make the facility an efficient productive unit in a highly competitive industry.

RAYMOND KOONTZ.

Subscribed and sworn to before me this 9th day of January, 1961.

ELWOOD C. WILSON, Notary Public, State of Ohio.

My Commission Expires Oct. 13, 1962.

[fol. 398] STATEMENT OF MR. MOSMAN

When I left Diebold in 1944 to take over management of the Herring-Hall-Marvin Safe Company, the company's commercial production was largely dormant from the impact of World War II, and the company had a negative surplus. However, I conceived that the pent-up demand for heavy bank equipment created by the war would offer a fine post-war opportunity for a small, alertly-managed company in the bank equipment business.

Until 1956, my expectations as to the market demand in the bank equipment field were realized. The abnormal demand resulting from the business deferred by the war

was compounded by a tremendous expansion of banking facilities in the early 1950's. From small beginnings in 1945, HHM increased its sales modestly from year to year until 1957 when sales for the year ending June 30, 1957, reached $10,672,000, almost realizing our projected quota for that year. On the basis of the 1957 performance, I set the company a sales goal of $14,250,000 for 1958. However, 1957 introduced the first moderately severe post-war recession and HHM's sales in 1958 amounted to $10,301,000 or 30 percent less than quota. In a determined effort to advance beyond our 1957 peak, I set a quota for 1959 of $12,500,000. But the company's business continued sluggish and sales fell below the preceding year to $10,023,000. It was becoming increasingly apparent that the abnormal [fol. 399] demand created by the post-war boom in the bank equipment field had come to an end, and it also began to appear to me that the level at which the normal continuing demand was stabilizing was such as to create substantial over-capacity in the bank equipment field. At about this time the degree of competition increased greatly and it was necessary to take business at lower prices. Also, it appeared that a substantial investment of additional capital for the improvement of plant facilities and production techniques was necessary if the company was to improve its profit on its volume of sales.

At all times the company had been short of working capital. From 1953 on, it was necessary to make use of bank loans on a straight note basis. Its balance sheets from June, 1950 down through 1958 continuously reflected liabilities well in excess of tangible net worth, and net working capital was at all times limited in relation to annual sales volume. In an effort to improve its net working capital position, the company consistently retained substantially all of its earnings, but the post-war corporate tax structure had made it difficult for a small company to accumulate capital from earnings. In an effort to concentrate its business activities in Hamilton, the company sold various assets and retained the proceeds in the business. For example, in 1954 the company received and retained $150,000 in insurance proceeds resulting from the complete destruction by fire of the facilities of our subsidiary, Thomas Manufacturing Company. In fiscal 1955, it sold

[fol. 400] its Quickdraft division for $100,000 on time payments. In fiscal 1959 it sold its Remington division for $90,000 and its Canadian subsidiary for $130,000. Still the relationship of current assets to current liabilities averaged only approximately 1.5 for the years 1951 through 1959. The company's sales leveled off after 1957 and after 1958 the inventory built up approximately $250,000. As a result, HHM's cash position became extremely tight, and in 1959 its net quick assets ratio dropped to .074, which was the lowest ratio since I took over the company in 1951.

In the spring of 1959 I was approached by the Safe Workers Organization, Chapter 1, as to the negotiations of a new labor contract. The union represented most of the hourly rated production and maintenance workers in the plant. Although we felt that the demands were excessive we were forced to settle substantially on the terms of the union, in view of the fact they threatened to strike the plant. The company could not stand a strike because of its limited working capital and the highly competitive nature of the industry. The union refused to allow the company to adopt a wage incentive program which was common in the rest of the industry. In addition, the basic hourly rates were higher than those common in the industry. As a result, the company was at a disadvantage as to its wage costs and as to its efficiency. It was necessary to increase the hourly income and fringe benefits to the other people in the company who were not in the union. [fol. 401] This placed an additional burden on the company's cash position and its competitive position. I considered this union situation so bad that I gave serious consideration to recommending to the Board of Directors that the company be liquidated.

I also became anxious over the absence of any executive personnel with managerial capacity to succeed me in the event of my death and the lack of funds to meet estate taxes without the compulsory liquidation of a substantial share of my holdings in the company. It was clear that any attempt to liquidate my own holdings for estate tax or other purposes might well result in a disasterous forced liquidation of the company. The only prospect of my estate realizing anything approximating what I felt was the real value of my investment was from an immediate

cash sale of the company to a company which would continue to service the customers which I had developed over my lifetime in the business. In addition, the increasing strain resulting from the highly competitive nature of the business which had developed in recent years was adversely affecting my health. I communicated all of these problems to the Board of Directors, and indicated that I was seriously considering selling my stock in order to diversify my holdings and to retire from active duties in the management of the company. The Board decided on the basis of all of the factors above that it would be in the best interest of all of the shareholders to entertain offers for the sale of all of the stock or all of the assets of the company.

[fol. 402] As a result of the determination of the Board of Directors, I talked with the President of Diebold, Incorporated, in May of 1959, who had been in touch with me about the prospects of selling the business for the past two years. Diebold indicated in this discussion that it would favorably entertain an offer to purchase substantially all of the assets of the company, in consideration of the payment of $3,000,000 in cash and the assumption by Diebold of substantially all of HHM's liabilities. Diebold, Incorporated, was the only firm or individual which proposed to pay the company $3,000,000 in cash and to assume substantially all of the liabilities of the company. The Board of Directors of the company concluded that this proposition would be the most advantageous insofar as the interests of all of the shareholders of the company were concerned. The proposition was submitted to the shareholders and duly approved at a meeting of shareholders called for that purpose. The sale was subsequently made by the company to Diebold, Incorporated.

Warren Mosman.

State of Ohio

County of Hamilton, ss:

Warren Mosman, being first duly sworn, deposes and says that he has read and signed the foregoing, and that the statements of fact contained therein are true to the best of his knowledge and belief.

Warren Mosman.

Sworn to and subscribed before me this 5th day of January, 1961.

Doris A. Furthmiller, Notary Public, Hamilton County, Ohio.

My Commission Expires Sept. 27, 1963.

[fol. 403] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF WARREN MOSMAN IN RESPONSE TO PLAINTIFF'S INTERROGATORIES—Filed January 20, 1961

STATE OF OHIO,
County of Butler, ss:

WARREN MOSMAN, being duly sworn, deposes and says:

1. I am President of Mosman Industries, Inc. (formerly Herring-Hall-Marvin Safe Company), (hereinafter referred to as "Mosman Industries, Inc.").

2. On January 10, 1961, my attorneys, Taft, Stettinius & Hollister, were served with interrogatories made by the plaintiff, directed to me, and dated January 6, 1961.

3. In answer to said interrogatories, I hereby state as follows:

Interrogatories Nos. 1 and 2:

Attached hereto, made a part hereof and marked "Exhibit A" are copies of 15 documents, the originals of which are in the possession of Mosman Industries, Inc. To the best of affiant's knowledge and belief, there are [fol. 404] no other records or other papers, except those hereto furnished to the Government, in the possession, custody or control of Mosman Industries, Inc., its officers, agents or employees which are referred to in said interrogatories.

Interrogatory No. 3:

Warren Mosman, President Mosman Industries, Inc., — First National Bank Building, Hamilton, Ohio.

Interrogatories Nos. 4, 5 and 6:

(a) In 1957 affiant was contacted by the representatives of Mosler Safe Company, Hamilton, Ohio, as to whether Mosman Industries, Inc. was interested in selling its assets or stock to Mosler Safe Company. There was a meeting in New York and one in Chicago at which the prospects of such a sale was discussed. There was some discussion as to price; however, affiant does not remember the amount which was discussed. Approximately two months later, affiant was advised by Mosler Safe Company that it was not interested in such an acquisition.

(b) In 1959 affiant was advised through John W. Cross, of 729 Fifteenth Street, N.W., Washington 25, D.C., that Mr. James Boyce, of Baton Rouge, Louisiana, and a representative of Hayden Stone and Company, New York, New York, might be interested in acquiring the assets or the stock of Mosman Industries, Inc.

An oral offer was made to acquire all the assets, except land, buildings and life insurance, for $3,000,000. To the best of affiant's knowledge and belief, the offer provided that the purchase price should be paid one-half in cash and one-half over a long term, to be secured by a mortgage on the assets. Since the Company was interested only in a sale for cash, it never acted on the offer and no further contact was made.

[fol. 405] (c) In 1959 representatives of the Lovell Manufacturing Company contacted affiant and stated that they were interested in acquiring a company. Informal discussions between affiant and representatives of Lovell led to a meeting in New York in April of 1959. Affiant indicated that the Company would not sell its assets for less than approximately $3,000,000 in cash. He was immediately advised that the Lovell Manufacturing Company was not interested in buying the Company under such circumstances.

(d) In 1959 affiant was contacted by the Bank of New York as to whether he was interested in disposing of his interest in Herring-Hall-Marvin. The Bank of New York

apparently was writing on behalf of Mr. T. C. Davis, of 230 Park Avenue, New York 17, New York. Affiant indicated that he was not interested in selling his interest in the Company. There was no further contact between the parties in reference to this, except as set forth in the exchange of correspondence which is attached hereto as part of "Exhibit A."

(c) To the best of affiant's knowledge and belief, the documents attached as "Exhibit A" and those documents heretofore furnished to the Government were the only records or memoranda made of such contacts.

Warren Mosman.

Subscribed and sworn to before the undersigned, a notary public in and for the state and county aforesaid, this 13th day of January, 1961.

Georgia Leftheris, Notary Public.

My Commission Expires March 19, 1963.

[fol. 406] EXHIBIT "A" TO AFFIDAVIT OF WARREN MOSMAN

EXHIBIT I TO EXHIBIT "A"

Law Offices
Cross, Murphy & Smith
Securities Building
729 Fifteenth St., N.W.
Washington 5, D.C.

April 13, 1959

Mr. Warren Mosman, President,
Herring-Hall-Marvin Safe Co.,
Hamilton, Ohio.

DEAR MR. MOSMAN:

Mr. Cross asked me to write you this morning and let you know that he had hoped to have gotten in touch with

you last week, but the week somehow slipped by before he got to it. He left for Europe on Saturday and I am sure he will not be gone for more than about ten days. He will be in touch with you as soon as he returns.

Sincerely, Beatrice P. Somes, Secretary to Mr. Cross.

Total Offer	$3,400,000.00
Less Land & Buildings—approximately	250,000.00
	$3,150,000.00
Less Cash Value of Life Insurance—approximately	150,000.00
	$3,000,000.00
For all assets except those mentioned above	$3,000,000.00
Rent on buildings and land for 20 years	$67,500.00 per year

[fol. 407] EXHIBIT II TO EXHIBIT "A"

Lovell Manufacturing Company
P. O. Box 1098
Erie, Pennsylvania

April 15, 1959

Mr. Warren Mosman, President,
Herring-Hall-Marvin Safe Co.,
Hamilton, Ohio.

DEAR MR. MOSMAN:

Thank you for the opportunity of meeting with you and Mr. Lawrence in New York last Monday. Mr. Doll and I feel it was not only time well spent, but we thoroughly enjoyed the evening as your guests.

You can expect to hear further from us within the next few weeks regarding some preliminary ideas concerning the matters which we discussed.

In the meantime, if you or Mr. Lawrence find it possible to stop and visit us in Erie, we will be happy indeed to see you.

With kind regards.

Sincerely yours, Lovell Manufacturing Company,
Orlo A. Ewing, Executive Vice President.

OAE:FB

[fol. 408] April 6, 1959

Mr. Orlo A. Ewing,
Executive Vice President,
Lovell Manufacturing Company,
P. O. Box 1098,
Erie, Pennsylvania.

DEAR MR. EWING:

Thank you for your letter dated April 2 which arrived this morning.

Mr. Mosman is out of town on a business trip and will not return until tomorrow. You can be sure, however, that upon his return to the office your letter will be called to his immediate attention.

Sincerely yours, Secretary to Mr. Mosman.

gll/s

[fol. 409] Lovell Manufacturing Company
P. O. Box 1098
Erie, Pennsylvania

April 2, 1959

Mr. Warren Mosman, President,
Herring-Hall-Marvin Safe Co., Inc.,
1550 Grand Blvd.
Hamilton, Ohio.

DEAR MR. MOSMAN:

It was a genuine pleasure meeting you last Monday and I wish to thank you for your fine hospitality. I enjoyed also meeting Mr. Lawrence and Mr. Hammond.

You will be happy to know that the business-like atmosphere which pervaded your entire organization made a most favorable impression, as did the beautiful products which are being made by your Company.

As a result of my visit, I would like very much to have an opportunity for our President, Mr. Edward C. Doll, to meet you. Since you mentioned your intention to be in

New York April 13th, 14th and 15th, we would be grateful if you would let us know of a convenient time and place that we could meet you there.

Congratulations on the remarkable achievement represented by your Company's progress during the past fifteen years! I hope the next fifteen years will be as rewarding.

Kindest regards.

Sincerely yours, Lovell Manufacturing Company,
Orlo A. Ewing, Executive Vice President.

OAE:FB

[fol. 410] EXHIBIT III TO EXHIBIT "A"

August 14, 1959

Mr. Eugene Van Ness,
Assistant Treasurer,
The Bank of New York,
48 Wall Street,
New York 15, New York.

DEAR MR. VAN NESS:

Thank you very much for your letter of August 12.

As you can see I have acknowledged a letter from Colonel Davis, a copy of which is attached.

With regard to the last paragraph of your letter, I shall be very pleased to contact you at some future date when I am in New York. Perhaps, we can arrange to have lunch at that time.

Sincerely yours, Warren Mosman, President.

WM:gll
Attachment (1)

[fol. 411] August 14, 1959

Mr. T. C. Davis,
230 Park Avenue,
New York 17, New York.

Dear Mr. Davis:

Thank you very much for your letter dated August 12.

When I saw Mr. Van Ness in New York I told him I would be glad to talk to both of you after we had closed our books as of June 30, 1959. We are still in the process of closing our books.

However, when you return from your European trip, perhaps, we can have the discussion referred to in your letter.

Sincerely yours, Warren Mosman, President.

WM:gll
cc: Mr. Eugene Van Ness—New York.

[fol. 412]

T. C. Davis
230 Park Avenue
New York 17, N. Y.

August 12, 1959

Mr. Warren Mosman, President,
Herring-Hall Marvin Safe Company,
Hamilton, Ohio.

Dear Mr. Mosman:

Apropos of your recent conversation with Mr. Van Ness of the Bank of New York and his indication to you that I was interested in talking with you, I am writing to confirm his statement in this regard.

What I wish to discuss with you are matters which could possibly be of mutual interest.

Should you possibly desire to pursue such a potentiality, I should be very happy to meet you here in New York or I could come to Hamilton or Cincinnati at a time to meet

with your convenience. I am, however, sailing for Europe on September 9th.

Sincerely yours, T. C. Davis.

T. C. Davis:ag

[fol. 413] The Bank of New York
New York's First Bank—Founded 1784
48 Wall Street, New York 15, N. Y.

August 12, 1959

Mr. Warren L. Mosman, President,
Herring-Hall Marvin Safe Company,
Hamilton, Ohio.

DEAR MR. MOSMAN:

You may remember that during our conversation last month I told you of Colonel Davis's interest in having the opportunity to sit down and discuss with you certain subjects which might prove of mutual interest. He has just returned from the South, and at luncheon today he indicated that he intended to write and try to arrange an appointment convenient to you both. Knowing that the Colonel is not one to let grass grow under his feet, it would not surprise me if you received a letter from him in this same mail.

I do hope that you had a pleasant and satisfactory vacation and that you found everything in good order in Hamilton on your return.

Sometime when you are again in New York and can find it possible, I do hope that you can arrange to have lunch with me and some of my associates. In the meantime, my kindest regards.

Sincerely yours, Eugene Van Ness, Assistant Treasurer.

[fol. 414] June 18, 1959

Mr. Eugene Van Ness,
Assistant Treasurer,
The Bank of New York,
48 Wall Street,
New York 15, New York.

Dear Mr. Van Ness:

Thank you for your letter dated June 15.

As soon as my itinerary is complete and my plans are definite for my next trip to New York I will write and let you know the dates and then contact you upon my arrival there.

Kindest regards.

Sincerely yours, Warren Mosman, President.

WM:gll

[fol. 415] The Bank of New York
New York's First Bank—Founded 1784
48 Wall Street, New York 15, N. Y.

June 15, 1959

Mr. Warren Mosman, President,
Herring-Hall Marvin Safe Company,
Hamilton, Ohio.

Dear Mr. Mosman:

Thank you very much for your kind letter which I received this morning, advising me that you had not gotten to New York last week. I was commencing to be afraid that I had missed you completely.

When you are able to make your plans for your next trip, if you will be good enough to let me know I will make myself available to meet you at any place or time most convenient.

In the meanwhile I send my kind regards.

Sincerely yours, Eugene Van Ness, Assistant Treasurer.

Thank him. Tell him I will contact him next time.

[fol. 416] June 11, 1959

Mr. Eugene Van Ness,
Assistant Treasurer,
The Bank of New York,
48 Wall Street,
New York 15, New York.

DEAR MR. VAN NESS:

An unforeseen situation arose which made it quite impossible for me to get in touch with you this month as originally planned.

However, on my next trip to New York I will contact you for the purpose of setting up a satisfactory time for our meeting.

Sincerely yours, Warren Mosman, President.

WM:gll

[fol. 417] The Bank of New York
New York's First Bank—Founded 1784
48 Wall Street, New York 15, N. Y.

June 8, 1959

Mr. Warren Mosman,
Waldorf-Astoria Hotel,
50th Street and Park Avenue,
New York, New York.

DEAR MR. MOSMAN:

Referring to your recent letter regarding your visit to New York, which you gave me to understand would be today and tomorrow, I called the Waldorf-Astoria this morning to see if by any chance I could make an appointment with you. They told me that your arrival had been delayed a day and you were expected tomorrow.

If you can find a moment to fit me in, I shall be free any time tomorrow to come uptown, with the exception of after 4:30 in the afternoon when I have an appointment in lower Manhattan. As far as the following day, Wednesday, is concerned, I shall be free in the morning until noon and

in the afternoon from about 2:30 again until about 4:00.

Possibly you can find some time within the limits of my two days to see me, if only for a few minutes, as I should certainly appreciate very much the opportunity to meet you.

Looking forward to hearing from you in the next day or so, I am

Sincerely yours, Eugene Van Ness, Assistant Treasurer.

[fol. 418] The Bank of New York

New York's First Bank—Founded 1784

48 Wall Street, New York 15, N. Y.

May 22, 1959

Mr. Warren Mosman, President,
Herring-Hall Marvin Safe Company,
Hamilton, Ohio.

DEAR MR. MOSMAN:

Thank you ever so much for replying so promptly to my inquiry of last week. It is very helpful for me to be able to go back to my principals and at least show them that we are on our toes with quick answers.

As you have indicated in your letter that you will be in New York on June 8 and 9, I shall hope that you may have a few minutes to see me during that time and I will take the liberty of trying to get in touch with you to set up a satisfactory time for you. In the meanwhile, my kind regards.

Sincerely yours, Eugene Van Ness, Assistant Treasurer.

[fol. 419] May 20, 1959

Mr. Eugene Van Ness, Assistant Treasurer,
The Bank of New York,
48 Wall Street,
New York 15, New York.

DEAR MR. VAN NESS:

Thank you very much for your letter dated May 15.

I appreciate the very nice things you have said about us in your letter, however, I hasten to tell you that our Company is not for sale.

Since you have made such nice remarks about us I would like to meet you on my next trip to New York. I expect to be at the Waldorf-Astoria Hotel on June 8 and June 9. So in line with this thought I may call and at least say "hello" to you while I am there.

Sincerely yours, Warren Mosman, President.

WM:gll

[fol. 420] The Bank of New York
New York's First Bank—Founded 1784
48 Wall Street, New York 15, N. Y.

May 15, 1959

Mr. Warren Mosman, President,
Herring-Hall-Marvin Safe Co.
1550 Grand Boulevard,
Hamilton, Ohio.

DEAR MR. MOSMAN:

A group of people with whom we are well acquainted and who are interested in making constructive investments, having requested that we inquire if you might have any interest in disposing of your controlling interest in Herring-Hall-Marvin Safe Co.

With the magnificent job you have done, I understand practically single-handed, in making Herring-Hall-Marvin such a successful operation, you will want to be sure of the quality of those with whom you are dealing. All I

can say to you is that the group we represent is top quality.

There will, naturally, be certain questions which will come to your mind, and I think the first of these might possibly be the question of working capital for further expansion. Our clients are well fortified with funds for such purposes. Another question that I think might come to mind would be that of your continuing actively in the management, and I am certain that you would find no objection whatsoever to an association with our people in your management. Further, should your deal be on the basis of an exchange of stock, I believe you would receive shares of a company which was incorporated in 1912 and whose stock is listed and actively traded on the New York Stock Exchange.

With the information I have given you, should you be interested in meeting our clients, I shall be delighted to make the necessary arrangements.

Sincerely yours, Eugene Van Ness, Assistant Treasurer.

[fol. 421] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF JOHN M. TOOHEY—Filed February 13, 1961

District of Columbia, ss:

JOHN M. TOOHEY, being duly sworn, deposes and says:

I am an attorney employed by the Antitrust Division, United States Department of Justice, and one of the attorneys of record for the plaintiff in the above-entitled action. The affidavit is respectfully submitted pursuant to Rule 56(f) of the Federal Rules of Civil Procedure for the purpose of showing that plaintiff cannot, for reasons stated below. present by affidavit at this time certain facts essential to plaintiff's opposition to the motion of defendant Diebold, Incorporated, for summary judgment, and to move the Court for an order granting a continuance until

March 20, 1961, to permit affidavits to be obtained and depositions to be taken.

Defendant's motion for summary judgment was served on January 18, 1961, and is noticed for hearing on February 13, 1961. Statements in the affidavits and papers supporting the motion show that some of the facts were developed after many months of study and analysis. With many of the facts already developed, defendant had an additional sixty days between November 18, 1960, and January 18, 1961, to collect further facts and to file its motion. The facts presented by the motion are complicated and require extensive and careful study.

[fol. 422] Questions regarding certain financial transactions of defendant Herring-Hall-Marvin Safe Company prior to its acquisition by Diebold have been raised by the motion for summary judgment, and plaintiff has served notice of taking of depositions of The First National Bank & Trust Company of Hamilton, Ohio, and several of its officers to inquire further into these financial transactions. In conjunction with the depositions plaintiff has asked the bank to produce, pursuant to subpoena duces tecum, certain documents and records relating to the years from June 30, 1956 through September 11, 1959. Affiant has been informed by Arthur Fille, Vice President of the bank, that it will require at least four days to collect only those documents relating to the first nine months of 1959. The bank will probably require additional time to collect the remaining documents requested. The depositions have been set for February 14, 1961, but may have to be moved to a later date to accommodate the bank.

In addition, on or about January 23, 1961, in response to interrogatories served January 9, 1961, plaintiff received from Herring-Hall-Marvin fifteen documents relating to the proposed sale of Herring-Hall-Marvin to prospective purchasers other than Diebold at or about the time of the negotiations between Diebold and Herring-Hall-Marvin. Evidence of the existence of other prospective purchasers is vital to a consideration of the issues under *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930), upon which defendant Diebold relies in its motion for summary judgment and is therefore vital to plaintiff's response to the motion. The docu-

ments produced by Herring-Hall-Marvin require interviews with persons and companies located in Baton Rouge, Louisiana; Erie, Pennsylvania; Washington, D. C.; and New York City. If these documents had been produced when first requested by plaintiff's Rule 34 motion of Septem-[fol. 423] ber 17, 1959, the information they contain would now have been fully investigated. Plaintiff is now investigating the information, initial contacts have already been made with persons at the places mentioned above, but it will require at least several more weeks to complete the investigation and obtain the necessary information by way of affidavits or depositions.

Because of the foregoing fact., plaintiff's investigation of its defenses to the motion for summary judgment could not be completed within the prescribed time. No previous extensions of time have been sought by plaintiff. Affiant respectfully submits that in view of the circumstances recited above it would be a proper exercise of the Court's discretion under Rule 56(f), FRCP, to grant the continuance here sought by plaintiff.

John M. Toohey.

Sworn to before me this 9th day of February, 1961.

Sara B. McGrann, Notary Public.

My Commission Expires May 1, 1961.

[fol. 424] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF EUGENE VAN NESS

AFFIDAVIT OF EUGENE VAN NESS—Filed February 13, 1961

STATE OF NEW YORK,
County of New York, ss:

EUGENE VAN NESS, being duly sworn, deposes and says:

1. I am Assistant Treasurer of The Bank of New York, 48 Wall Street, New York 15, N.Y.

2. In the spring of 1959, it came to my attention through Mr. Arthur L. Lindley, New York Branch Manager of

Herring Hall & Marvin Safe Company (H.H.M.), that Mr. Warren Mossman, President of H.H.M., might possibly be interested in discussing a disposition of H.H.M.

3. At about the same time, I also learned through Mr. Robert A. Ward of Ebasco Services Inc. that Colonel T. C. Davis had a continuing interest in attractive investment opportunities, and specifically might have some possible interest in trying to arrange an exchange of H.H.M. stock for that of some company in which Colonel Davis had a present interest. Specifically Mr. Ward mentioned American Chain & Cable Company, of which Colonel Davis was a Director.

4. At the suggestion of Mr. Ward, I telephoned Colonel Davis to ascertain whether he might possibly have any interest in meeting with Mr. Mossman in the event that Mr. Mossman proved receptive to the suggestion of a meeting. Colonel Davis indicated he had little knowledge of the H.H.M. company, but that he was always willing to explore an investment possibility.

5. After my telephone conversation with Colonel Davis, I wrote Mr. Mossman the letter of May 15, 1959, a copy of which is attached hereto as Exhibit 1.

6. I thereafter received a letter dated May 20, 1959 (copy of which is attached hereto as Exhibit 2) from Mr. Mossman stating that his Company was not for sale but that he would be glad to "call and at least say 'hello'" when next in New York.

[fol. 425] 7. Mr. Mossman did not come to New York as he had indicated in Exhibit 2 and accordingly, I did not succeed in meeting Mr. Mossman in New York, until July 21, 1959, when I visited him in his suite at the Waldorf Astoria. At that time, I described to Mr. Mossman the possible interest of Colonel Davis in arranging a sale or merger of H.H.M. I made it clear to Mr. Mossman that I was not authorized to make an offer on behalf of Colonel Davis and that I could not predict whether negotiations between Colonel Davis and Mr. Mossman, if any, held any promise. Mr. Mossman's attitude was generally negative, but he expressed a willingness to meet with Colonel Davis.

8. I thereafter met with Colonel Davis who indicated a desire to meet Mr. Mossman. I wrote to Mr. Mossman a letter dated August 12, 1959, a copy of which is attached

hereto as Exhibit 3, and received in reply from him a letter dated August 14, 1959 with inclosure, copies of which are attached as Exhibit 4. So far as I know, a meeting between Mr. Mossman and Colonel Davis never materialized nor was any financial data or operating figures ever supplied to Colonel Davis by Mr. Mossman.

9. To the best of my recollection, my first knowledge that Mr. Mossman had contracted to sell the assets of his company to Diebold Incorporated came to me not before August 25, 1959.

Eugene Van Ness.

Subscribed and sworn to before me this 10th day of February, 1961.

William G. Leary, Notary Public.

Term Expires March 30, 1962.

[fol. 426] Copy for Correspondence

EXHIBIT 1 TO AFFIDAVIT OF EUGENE VAN NESS

May 15, 1959.

Mr. Warren Mosman, President,
Herring-Hall-Marvin Safe Co.,
1550 Grand Boulevard,
Hamilton, Ohio

Dear Mr. Mosman:

A group of people with whom we are well acquainted and who are interested in making constructive investments, have requested that we inquire if you might have any interest in disposing of your controlling interest in Herring-Hall-Marvin Safe Co.

With the magnificent job you have done, I understand practically single-handed, in making Herring-Hall-Marvin such a successful operation, you will want to be sure of the quality of those with whom you are dealing. All I can say to you is that the group we represent is top quality.

There will, naturally, be certain questions which will come to your mind, and I think the first of these might possibly

be the question of working capital for further expansion. Our clients are well fortified with funds for such purposes. Another question that I think might come to mind would be that of your continuing actively in the management, and I am certain that you would find no objection whatsoever to an association with our people in your management. Further, should your deal be on the basis of an exchange of stock, I believe you would receive shares of a company which was incorporated in 1912 and whose stock is listed and actively traded on the New York Stock Exchange.

With the information I have given you, should you be interested in meeting our clients, I shall be delighted to make the necessary arrangements.

Sincerely yours, —— ——.

[fol. 427] EXHIBIT 2 TO AFFIDAVIT OF EUGENE VAN NESS

Herring—Hall—Marvin Safe Co.
Hamilton, Ohio

May 20, 1959

Mr. Eugene Van Ness, Assistant Treasurer,
The Bank of New York,
48 Wall Street,
New York 15, New York

Dear Mr. Van Ness:

Thank you very much for your letter dated May 15.

I appreciate the very nice things you have said about us in your letter, however, I hasten to tell you that our Company is not for sale.

Since you have made such nice remarks about us I would like to meet you on my next trip to New York. I expect to be at the Waldorf-Astoria Hotel on June 8 and June 9. So in line with this thought I may call and at least say "hello" to you while I am there.

Sincerely yours, Warren Mosman, President.

WM:gll

[fol. 428] EXHIBIT 3 TO AFFIDAVIT OF EUGENE VAN NESS

Copy for Correspondence Files only

(To be initialed by Signing Officer)

August 12, 1959

Mr. Warren L. Mosman, President,
Herring-Hall-Marvin Safe Company,
Hamilton, Ohio

Dear Mr. Mosman:

You may remember that during our conversation last month I told you of Colonel Davis's interest in having the opportunity to sit down and discuss with you certain subjects which might prove of mutual interest. He has just returned from the South, and at luncheon today he indicated that he intended to write and try to arrange an appointment convenient to you both. Knowing that the Colonel is not one to let grass grow under his feet, it would not surprise me if you received a letter from him in this same mail.

I do hope that you had a pleasant and satisfactory vacation and that you found everything in good order in Hamilton on your return.

Sometime when you are again in New York and can find it possible, I do hope that you can arrange to have lunch with me and some of my associates. In the meanwhile, my kindest regards.

Sincerely yours, Eugene Van Ness, Assistant Treasurer.

[fol. 429] EXHIBIT 4 TO AFFIDAVIT OF EUGENE VAN NESS

Herring—Hall—Marvin Safe Co.

Hamilton, Ohio

August 14, 1959

Mr. T. C. Davis,
230 Park Avenue,
New York 17, New York

Dear Mr. Davis:

Thank you very much for your letter dated August 12.

When I saw Mr. Van Ness in New York I told him I would be glad to talk to both of you after we had closed our books as of June 30, 1959. We are still in the process of closing our books.

However, when you return from your European trip, perhaps we can have the discussion referred to in your letter.

Sincerely yours, Warren Mosman, President.

WM:gll
cc: Mr. Eugene Van Ness—New York

[fol. 430] Hering—Hall—Marvin Safe Co.

Hamilton, Ohio

August 14, 1959

Mr. Eugene Van Ness,
Assistant Treasurer,
The Bank of New York,
48 Wall Street,
New York 15, New York

Dear Mr. Van Ness:

Thank you very much for your letter of August 12.

As you can see I have acknowledged a letter from Colonel Davis, a copy of which is attached.

With regard to the last paragraph of your letter, I shall be very pleased to contact you at some future date when I am in New York. Perhaps we can arrange to have lunch at that time.

Sincerely yours, Warren Mosman, President.

WM:gll

Attachment (1)

[fol. 431] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Transcript of Proceedings of February 13, 1961

(Hearing on Plaintiff's Motion for Continuance.)

Be it Remembered that on Monday, February 13, 1961, at 2:00 o'clock P. M., the above-styled action came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division.

[fol. 432] APPEARANCES:

For the Plaintiff, Richard H. Pennington, Assistant United States Attorney.

For the Defendant Diebold, Incorporated: William L. McGovern, Esq. of Arnold, Fortas & Porter and Frederick A. Reister, Esq. of Milliken, Reister, Fitton & Latimer.

[fol. 433] The Court: Weren't you notified that we granted an extension here?

ARGUMENT BY MR. MCGOVERN

Mr. McGovern: Your Honor, I am notified that the Government was going to apply for an extension. I told them if they had in mind having Mr. Pennington suggest to your Honor no more than, let's say, Wednesday or Thursday of this week, that, of course, that was so reasonable that I couldn't object to it. But I received the impression via telephone calls back and forth that apparently the Government had in mind a longer period, and in my judgment any longer period than that is absolutely unjustified.

I think the situation in Hamilton, Judge Druffel, is so critical that we must examine carefully, precisely how long the Government wants and what they want it for.

Mr. Pennington: Why, they took 60 days to file their

motion. All we want is 60 days from the time they filed their motion, which would bring this matter up to around the 20th of March. As I understand it, this matter, from what I hear from the parties, will take about a day to hear; and your docket wouldn't permit the hearing of it until March the 27th.

Mr. McGovern: Now, with all due respect to Mr. Pennington, Judge Druffel, I don't know where he gets the idea about where we took 60 days and they are entitled to 60 days.

Your Honor will recall that we were here on November [fol. 434] 18th. Your Honor suggested that we take—that is, both sides take 60 days to explore the facts and see if we could arrive at some sort of a consent judgment.

Immediately upon leaving this courtroom we went back to Washington, D. C. I told them what I would suggest we do, that we have Lybrand, Ross and Montgomery, certified public accountants, immediately go into the plant and examine all the facts and figures; do they have any suggestions. The Government said, "No. Go ahead."

We gave them that Lybrand-Ross report, your Honor, on December 14th. Now, that is the basic report on which our motion is based and on which this whole case will turn.

They have had that report since December 14th. What they have been doing between then and now, frankly, I don't know. They now say that want to take the deposition of these bankers.

The Court: Well, isn't it characteristic? Weren't you in the Antitrust Division one time?

Mr. McGovern: Yes. Yes, I was, but I do think, your Honor, where we had a circumstance as critical as this, we didn't sit on our hands, which is in effect what they have been doing here.

Now, let me point out to your Honor why this is so serious to me at the moment. I say to you that under Rule [fol. 435] 56, as Mr. Pennington knows, after giving them the data, I had an obligation—and the rule is absolutely explicit—to give them 10 days' notice, and that's all the rule requires. Instead of that they got 24 days' notice. Today is the 24th day since I filed that motion.

Now, here is the difficulty we have about this, Judge

Druffel: When I was here last, I pointed out to your Honor that we were going to go ahead and try to save some small expenses around the country, for example, in the sales offices, because we were suffering these dreadful losses down here. Your Honor will recall I mentioned we had suffered a loss of $106,000 in July of last year.

Now, those losses have continued. Judge Druffel. We lost $50,000 in December of last year. We now estimate that the loss, the operating loss, of that plant for January of this year will be in the neighborhood of $100,000.

Now, as a result of that, your Honor, on January 31st and February 4th of this year we were compelled to lay off 95 employees in that plant. Now, when we took the plant over, it originally had 670 employees. We are now down to about 350.

And the situation, your Honor, has now reached the desperate plight where any very much longer delay in this case and we are not going to have a plant open down there, so it won't make any difference how long the Government takes.

[fol. 436] Now, in those circumstances, I say the Government has an obligation to the public interest, as well as to ourselves and the employees, to move along down as fast as they properly can. What I don't understand is: What do they propose to do with the next 20 or 30 days?

Mr. Pennington: We have depositions settled. We have to investigate the offers. Judge, here is an affidavit they have prepared pursuant to Rule 56(f).

The Court: Do you have a copy of it?

Mr. McGovern: I just got a copy of this. In fact, I don't know that a motion has been made for an extension of time.

Mr. Pennington: Well, I am so moving.

Mr. McGovern: Orally?

Mr. Pennington: Yes.

Mr. McGovern: Very good.

Could I read this affidavit with you, Judge Druffel?

The Court: Yes.

Mr. McGovern: I have some comments I would like to make about it. Down there, sir, in the second full paragraph:

"Defendant's motion for summary judgment was served on January 18th, 1961, and is noticed for hearing on February 13, 1961."

[fol. 437] That's true. I point out that is 24 days, whereas Rule 56 only requires 10 days' notice. The next thing says:

"Statements in the affidavits and papers supporting the motion show that some of the facts were developed after many months of study and analysis."

Now, I am sorry to say that is simply not true, and Mr. Toohey knows it. Our first conference with the Government to develop the data on which this failing company doctrine was based was after the hearing with your Honor here in court and on November 25th that Lybrand-Ross examination took place during the first week of December. That is the analysis which disclosed the facts that he now says took several years to develop. It took several days, but several days of very hard, intensive work, the kind of work you might expect from the Antitrust Division —occasionally.

The Court: Occasionally.

Mr. McGovern: Now, he says, "With many of the facts already developed—" I am still reading at the bottom of the page—"defendant had an additional sixty days between November 18, 1960 and January 18, 1961, to collect further facts and to file its motion."

Now, your Honor, I suggest that the statements that Mr. Pennington just made, it's a distortion of what your Honor told us in the record. You told the two of us to get [fol. 438] together and take 60 days. I have used my 60 days as fruitfully as I could. But what I would like to know is, what has the Government done during its 60 days?

Coming over to the next page:

"Questions regarding certain financial transactions of defendant Herring-Hall-Marvin Safe Company prior to its acquisition by Diebold have been raised by the motion for summary judgment, and plaintiff has served notice of taking of depositions of The First National Bank and Trust

Company of Hamilton, Ohio, and several of its officers to inquire further into these financial transactions. In conjunction with the depositions plaintiff has asked the bank to produce, pursuant to subpoena duces tecum, certain documents and records relating to the years from June 30, 1956 through September 11, 1959. Affiant has been informed by Arthur Fille, Vice President of the bank, that it will require at least four days to collect only those documents relating to the first nine months of 1959. The bank will probably require additional time to collect the remaining documents requested. The depositions have been set for February 14, 1961, but may have to be moved to a later date to accommodate the bank."

The Court: What does the evidence show about that?

Mr. McGovern: Let me tell you about that. This first Lybrand-Ross report, which is the report they have informed me they now want to go into with the bank, was [fol. 439] served on the Government on December the 14th. No fact or figure in that report was changed from then to the present day. This is the report which shows the red operating figures. I don't know whether your Honor has had a chance to examine it or not.

The Court: I don't know.

Mr. McGovern: It was attached to the papers. I am saying the Government has had it since December the 14th. They now tell me, your Honor, they do not challenge —they do not challenge—the accuracy of what that report shows; but they want to go in and ask the bank to produce all those records.

The Court: What will it show? It won't show anything different than this?

Mr. McGovern: I said to them, "If you concede the authenticity of these figures, what do you hope to show by going into the bank's files?"

I haven't got an answer yet.

Well, anyway, Judge Druffel, I gave them to them on December 14th, where they were until last Friday, which was the first day they noticed this deposition. What were they doing?

Now, sir, that report, because of the cost, just the sheer cost of having Lybrand-Ross put a whole team of auditors into that company, the sheer cost to us—That report is confined to the first nine months of 1959. As your Honor [fol. 440] knows, we bought the plant on September 11th, 1959.

The only relevant period of time, Judge Druffel, from the standpoint of your inquiry into whether or not this was a failing company, is, of course, that period surrounding the time when we bought it. It doesn't make any difference what it was doing in '56.

And so the Government I think, if they are going to go ahead with this deposition at all, your Honor, should be confined to inquiring of the bank for the first nine months of '59. We don't care what happened in '56 or '57. It's not relevant to the inquiry before your Honor today.

And since we are now dealing with oral motions here in Court without notice to either side, as Mr. Pennington just showed me, I now orally move that under Rule 30 any deposition to be taken of the bankers tomorrow be confined and restricted to the period of the first nine months of 1959. That won't take several days.

The Court: Well, what do they hope to show in the first nine months?

Mr. McGovern: Well, Mr. Pennington can tell you. I don't know frankly. I do not know.

The Court: Why, it kind of smacks of stalling.

Mr. McGovern: I am afraid, your Honor, what we have got is a foot-dragging process. I know the Government is very chagrined at those red figures. In fact, I am shocked [fol. 441] and surprised myself. I didn't realize they would be so red. But they are there and they are certified figures. The Government says they don't challenge them. Now, if they don't, what are we wasting time taking the bankers' depositions? What can they say?

The Court: We will put the Government on notice to show cause why they shouldn't take the evidence other than nine months.

Mr. McGovern: Confine themselves to the first nine months?

The Court: Yes.

Mr. McGovern: I would think that's reasonable. If they can come in and make any kind of a showing at all of this inquisition of the bankers, that's one thing. But I just don't see it. I don't see how it's relevant.

Mr. Pennington: I don't see how you can see until the deposition is taken, if it please the Court.

Mr. McGovern: I say I have conclusive proof—If you have examined that—I have conclusive proof, your Honor, that this company was failing.

The Court: Tell your Washington counsel, will you, that they will have to come in immediately with good cause to show why they should go beyond the nine months, because they can't change the figures.

Mr. McGovern: Let me say something else about that [fol. 442] just to show that maybe we are in a foot-dragging technique. I don't know.

The Government told me that they couldn't get these bankers on earlier because all of the bankers' files were on microfilm and they had to get the microfilm out of the warehouse and then put it on a screen and so forth.

I said to them: "Please don't bother doing that. I don't want to read microfilm. You don't want to read microfilm. I am sure Judge Druffel doesn't want to read microfilm. We have got the original checks. We have got the original bank statements. Go to Hamilton. They are there. Go to Hamilton and look at them."

No, they won't do that. They insist on having the bank produce them off of microfilm.

All right. Let's come down a little bit, Judge Druffel. They say:

"In addition, on or about January 23, 1961, in response to interrogatories served January 9, plaintiff received from Herring-Hall-Marvin fifteen documents relating to the proposed sale of Herring-Hall-Marvin to prospective purchasers other than Diebold at or about the time of the negotiations between Diebold and Herring-Hall-Marvin. Evidence of the existence of other prospective purchasers is vital to a consideration of the issues raised under International Shoe, upon which defendant Diebold relies [fol. 443] in its motion for summary judgment and is therefore vital to plaintiff's response to the motion. The docu-

ments produced by Herring-Hall-Marvin require interviews with persons and companies located in Baton Rouge, Louisiana; Erie, Pennsylvania; Washington, D. C.; and New York City."

Now, let's stop there for a moment, your Honor. They got that information about, I think, three weeks ago. Anyway, they got it at the same time I got it.

Now, as your Honor remarked the last time we had a hearing here, the Government has the F. B. I. as a general investigative force with branch and regional offices all over the country. I didn't have any such thing; but, your Honor, I am sure it isn't a surprise to you how I found out about those people. When this interrogatory answer came in, with the attached documents, I simply got on the telephone and called them all up, and in the course of 48 hours knew the whole story.

Now the Government tells me with respect to one of these —Mr. Nolte told me on Friday that from the Bank of New York, which is set forth in one of these exhibits, he had called Mr. Van Ness, the man who signed this letter, only Friday of last week, three weeks after I had the information; and he asked Mr. Van Ness would he give him an affidavit.

And Mr. Van Ness told him: "Why, I have already given one to Mr. McGovern. If you want one, tell me what to [fol. 444] say. I must submit it to the bank's counsel."

I told Mr. Nolte not to bother, that I had an affidavit and I would be glad to give him a copy of it; and I will give it to Mr. Pennington now (handing document to Mr. Pennington).

I would like to hand it up to your Honor (handing document to Court). It will show you the kind of monkey business that was going on back in this period of time.

The Court: What would they accomplish by it?

Mr. McGovern: Mr. Mosman's affidavit shows that these things were all—your Honor, just a con game was going on with a bunch of middlemen, a bunch of brokers; they were out looking for commissions themselves. None of them made a firm offer and none of them ever got to the point of having a serious discussion of who would pay what.

Mr. Mosman's affidavit makes it absolute that Diebold was the only one that ever offered them $3,000,000 cash and he, as your Honor knows, grabbed it. Now, what is all the rest of this about?

Anyway, I am saying if you want to find out, all you have got to do is ask. Why does the Government now want to start searching around with these people? I was able to do it by telephone. I would think they would be able to do it too.

Now, one think more on that point. Now they argue [fol. 445] that they need time to respond to my memorandum of law in support of the case. As they point out, I told them two months ago—in fact, your Honor will recall, I mentioned the day we were in Court here on November 18th, there is only one precedent available on this failing company argument. It's the International Shoe case. Fortunately, it's one of those good old cases in the good old days when the Court said in a rather few succinct paragraphs exactly what they meant. There isn't any mystery about it.

So the Government doesn't need to do a lot of research. There is only one question. The question is: Do the facts in those Lybrand reports meet this test or don't they? And as I pointed out to you, the Supreme Court made it clear that the company needn't be insolvent, it needn't be in bankruptcy; it need only tend toward acts in that direction.

We show this company wasn't solvent. We show it had checks that couldn't be covered by any existing bank balances, even payroll checks. I think it's clear that in view of that circumstance, whenever he paid any creditor, any trade bill, he necessarily preferred that creditor to others, which would be a technical, I suppose, act of bankruptcy.

But on this question, your Honor, as to whether or not maybe some alternative purchaser or some bank would loan them money, that very argument was made to the Supreme Court, and they handled it in these few words. I [fol. 446] am reading now from page 92 of 50 Supreme Court Reporter:

"It was suggested by the court below, and also here in argument, that instead of an outright sale, any one of several alternatives might have been adopted which would

have saved the property and preserved competition; but, as it seems to us, all of these may be dismissed as lying wholly within the realm of speculation. The company might, as suggested, have obtained further financial help from the banks, with a resulting increased load of indebtedness which the company might have carried and finally paid, or, on the other hand, by the addition of which, it might more certainly have been crushed. As to that, one guess is as good as the other."

And they dismissed the whole argument as to whether or not somebody else might possibly have been willing to buy the company.

Now, as I say, in the light of that, in the light of the only law we have which is applicable, what in the world is the Government doing running around here saying, "We have got to find out if maybe some other broker might have been willing to find a buyer who might have been willing to meet a seller?"

I say, meanwhile we are losing money hand over fist in Hamilton.

The Court: How much time are you willing to give them? [fol. 447] Mr. McGovern: Well, I had thought, your Honor, if they wanted to satisfy themselves as to the first nine months of 1959, they could do it tomorrow. We are taking these depositions tomorrow. But I would like to come back into this Court on Thursday or Friday of this week and tell your Honor, "All right, now where do we stand?" because if it continues much longer, there will be no plant up there.

Now, your Honor, I needn't tell you that Hamilton is a depressed area——

Mr. Pennington: They knew what they were getting into when they went into this whole thing.

The Court: Well, did they know or didn't they? If they had known what they were getting into, they would have never gotten into it.

Mr. McGovern: That you can be sure of.

Mr. Pennington: It's hard for me to believe how one of the most successful businesses in the country can get conned into a situation like this.

Mr. McGovern: Have you studied the papers? The

Lybrand reports will show you that we were given misleading balance sheets, the nature of which we didn't discover until four months or five months after we bought the company.

Mr. Pennington: Well, Judge, the only thing I can say about this case is, since I received the copy of the motion for summary judgment—and we only received one copy, [fol. 448] which I had to send to Washington——

Mr. McGovern: I had already served them in Washington.

Mr. Pennington: I didn't know that, and so I forwarded it down there. I didn't have a chance to go through the contents of that motion because I wanted to get it down there as fast as I could. Mr. McGovern knows very well that I had talked to the Court because I talked to Mr. Reister and I talked to Washington, told them I would talk to your Honor on Thursday. Your Honor said that it was all right; you would give us that time and I should arrange with your secretary for a date.

I said, however, Mr. McGovern would like to be heard—or Mr. Reister would like to be heard. Mr. Reister called Mr. McGovern. Then Mr. McGovern comes out here. He had no intention of coming out here before. Now he does——

Mr. McGovern: Just a minute. Are you saying I had no intention of coming out here? If you are, I ask you to retract that statement.

Mr. Pennington: I am telling you all I know.

Mr. McGovern: You didn't know very much. I intended to come out, as Mr. Reister and my associates know, from that day. I thought when you put a motion on this calendar, returnable on a certain day, that, of course, you had an argument on that day.

[fol. 449] Mr. Pennington: I am just stating what I know, Judge. And since I have received that, I cannot say that the Government has been dragging its feet.

The Court: It seems to me from the suggestion they want to check with persons in Baton Rouge, Erie, Pennsylvania and Washington, D. C., that's more or less of a fishing expedition, stalling.

As I suggested to Washington counsel for the Government when they were here before, I thought the time would

come to come up with a consent entry, and I still think they should.

Mr. Pennington: Well, I think the Government ought to be able to have an opportunity to file its brief and plan.

Mr. McGovern: That's another point, your Honor. I gave the Government a proposed consent decree back last January 12 (handing document to Court). I have never heard "aye," "yes," or "no" from the Government about that.

I think, your Honor, in the light of the condition of failing company we have shown here, this is a lot more than they are entitled to have me offer because I have made them a bona fide offer.

Now, let me say about this fellow from Baton Rouge. Maybe Mr. Pennington doesn't know this. I have been in touch with the Government all last week. All there is on [fol. 450] this fellow in Washington, D.C. is a letter attached to the Mosman affidavit from Mr. Cross, an attorney in Washington. Both Mr. Nolte and myself have contacted Mr. Cross and his secretary Miss Somes, and we have been assured they don't know one thing more than what appears on that letter; and that's all there is to it. Now, that disposes of the Baton Rouge and Washington, D. C.

As I say, with regard to the fellow in New York, I just gave him a copy of Mr. Van Ness' affidavit. That's taken care of. Now, what are we left with?

Now, let's get back to Mr. Pennington's suggestion that we should have known what we were doing when we bought this plant.

The Court: What's the use of going into that?

Mr. McGovern: I just want to raise this one point for your Honor. Your Honor knows that the reason why we are having such terrible difficulty since we took over in trying to put that plant on a paying basis and keep those people at work is because we voluntarily made a representation on the record here at the time when your Honor denied the temporary injunction that we would not undertake to move any business from Canton down to Hamilton or transfer or change any of the assets in Hamilton.

Now, we have tried, your Honor, as much as good faith would permit us, to abide by that commitment to your [fol. 451] Honor. But I am saying it's that commitment that even today prevents us from trying to somehow or

other follow the advice of our consulting engineers and get that plant in some sort of an efficient, paying, productive condition.

And if the Government wants more time beyond this date, which I say is all they are entitled to—and more, under the rules—if they want more time, your Honor, then I wish you to give me permission to withdraw that commitment on the record and we will go ahead in the meantime and see if we can possibly save that plant.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well, if you will remember, I suggested to Washington counsel that they had an obligation to keep Diebold from losing any more money if they could, and I still say that.

You are going to take depositions tomorrow, you say?

Mr. McGovern: That's right.

Mr. Pennington: Yes, sir.

Mr. McGovern: I say, if they will confine themselves to 1959, I understand from Mr. Toohey's own affidavit that the bankers will have that material tomorrow and we ought to be able to complete and at least exhaust that situation. And I am sure it won't make the slightest bit of difference in terms of the Lybrand-Ross reports because the Government tells me they do not intend to impeach those [fol. 452] reports.

Mr. Pennington: We have another problem here. Mr. Fille of the bank who was subpoenaed for those depositions is in the hospital with a heart attack.

The Court: They must have somebody else.

Mr. Pennington: Well, we are hoping that someone else can act in his place. I don't mean Mr. Fille.

Mr. McGovern: Mr. Thomas.

Mr. Pennington: Mr. Thomas, and Mr. Fille may be able to act in his stead. If so, we don't anticipate any complication there.

But, Judge, I know the Government has been working—Just the minor part I play in this case, I have been serving papers, getting depositions and I talked to Washington— well, four times in the last couple of weeks.

Mr. McGovern: Well, in that au courant with the case, let me ask you why it was that it wasn't until Friday that you served that notice of depositions on the bankers? What

were you doing between December 14th, when I gave you the Lybrand-Ross report, and last week? They could have taken the deposition in December.

Mr. Pennington: That was filed many weeks ago. Just because the marshal didn't get out to serve——

Mr. McGovern: The notice of deposition, did you say, filed? It was served on me a week ago Friday.

[fol. 453] The Court: Well, all right. Repeat that motion, will you, about limiting the deposition?

Mr. McGovern: Yes: I now move, Judge Druffel, under Rule 30, to limit and confine the deposition of the officers of the First National Bank of Hamilton to the activities of the bank in connection with Herring-Hall-Marvin Safe Company during the first nine months of 1959.

Let me add this——

Mr. Pennington: And the Government—I beg your pardon.

Mr. McGovern: Mr. Pennington, please. —without prejudice, your Honor, depending upon what that shows, to come back to your Honor and ask for permission to go into some other period.

Fair?

Mr. Pennington: All right. We would just like to be further heard on it if those circumstances exist.

The Court: Well, I think I know enough about it to say that it looks like a fishing expedition just simply to block this.

How much more time will you give them for whatever they have got to find out?

Mr. McGovern: Let me suggest this, if I may, Judge Druffel, to be fair again about it:

I say that had they merely asked for a few days to [fol. 454] get by this deposition, of course I couldn't say that was unreasonable. But I have this terribly desperate plight of my own company down there in Hamilton. I can't forget it for a single moment.

I suggest, sir, we go ahead with the deposition tomorrow; let's see what it turns up. If in fact it turns out to be a lost cause completely, just a sheer fishing expedition, then let us come back to your Honor with Mr. Pennington either on Wednesday or Thursday and see if we can agree on some reasonable date when we can get this thing finally disposed of.

The Court: How does that strike you?

Mr. Pennington: Well, if the Court is going to continue the hearing on this motion, it's all right with me. It was my understanding that we would have until the 20th of March though.

The Court: Well, of course, you get a telephone call from Washington; you repeat it to me and I have to take what you say as a fact. But now when it is explained in open court here, it doesn't appear to be that important at all.

Mr. Pennington: Well, I don't know all the facts on this. We just have to take what Mr. McGovern says. He won't take what we say in affidavits, so I think we ought to have an opportunity to meet the facts with someone in the know.

[fol. 455] The Court: Well, right from the beginning the Government came in here and got a temporary restraining order; and then when it was moved to dissolve it and we gave them a week or so to come up with some evidence, they failed to come up with anything at all, just to find the injunction.

Mr. McGovern: That's right. I say, your Honor, it's one thing to file an affidavit ex parte with the Court and something else to stand up here in open court, which is what I am doing. And I will undertake to support, Mr. Pennington, any statement I have made.

The Court: All right. I tell you what we will do. You are going to take your depositions?

Mr. McGovern: The Government's depositions tomorrow.

The Court: And you will be here Wednesday at 11:00 o'clock and agree on some further procedure. But we have got to get it out of the way.

Mr. Pennington: Well, as I told the Court, we would be prepared finally and we would ask for no further continuance on March the 20th, and they guaranteed me in Washington that that would be the final date and they would be prepared to submit their briefs on the motion.

Mr. McGovern: Now, your Honor, all I say is let them tell your Honor what it is they propose to do that would cast any light on this question between now and March 20th.

[fol. 456] The Court: All right; Wednesday at 11:00 o'clock.

(Thereupon, at 2:29 o'clock P. M., the hearing in the above-styled action was continued until February 15.)

[fol. 457] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Transcript of Proceedings of February 15, 1961

(Hearing on Plaintiff's Motion for Continuance.)

Be it Remembered that on Wednesday, February 15, 1961, at 11:00 o'clock A. M., the above-styled action came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division.

[fol. 458] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice and Walter T. Nolte, Attorney, Department of Justice and Richard H. Pennington, Assistant United States Attorney.

For the Defendant Diebold, Incorporated: William L. McGovern, Esq. of Arnold, Fortas & Porter and Frederick A. Reister, Esq. of Milliken, Reister, Fitton & Latimer.

For the Defendant Herring-Hall-Marvin Safe Company: Murray S. Monroe, Esq. of Taft, Stettinius & Hollister.

[fol. 459] The Court: Good morning.

ARGUMENT BY MR. NOLTE

Mr. Nolte: Good morning, your Honor.

If the Court please, for the Government, we are here to continue the hearing of Monday on the Government's application under Rule 56(f), supported by the affidavit which your Honor has, for a continuance of time to file opposing papers on the motion of defendant Diebold for summary judgment.

The Court: Excuse me just a minute. Will you send the file up here? I don't have it.

The Clerk: O. K., your Honor. I missed that.

The Court: O. K. Go ahead.

Mr. Nolte: We are here, your Honor, to tell the Court what we have done and what we are doing and why, under the International Shoe case, upon which the defendant Diebold principally relies in support of its motion. It is our firm view that your Honor does not have at this time before him sufficient proofs now to decide the Diebold motion under the International Shoe doctrine.

First I would like to clear up for the Court the matter of our application. As your Honor knows, we are applying under Rule 56(f), which provides that the opposing party may file affidavits showing the need for time to obtain sufficient affidavits or deposition proof to oppose the motion.

Now, if I may briefly, your Honor, I will refer the Court [fol. 460] to some of the statements of the Supreme Court in the International Shoe case, which set up the fact criteria for the determination of an issue of this sort on failing company, and then tell your Honor what we have done and what we are doing and precisely what we propose to present in opposition to the motion under that International Shoe doctrine.

The majority of the Supreme Court was dealing there with the acquisition of McElwain Shoe Company by International Shoe. This was a matter which arose between the companies in 1920 and '21, and the decision was handed down by the Supreme Court in 1930 and dealt with the conditions as of 1920 and '21 when the decision was handed down.

The Court said, among other things, there was a marked recession in the shoe market and the commodity market generally at the time of the acquisition. That factor is not present here. The acquired company, said the Court, had excessive materials and finished goods in inventories. The acquired company, said the Court, was unable to meet its indebtedness for large sums of borrowed money. There was no showing to that effect before your Honor here.

The officers concluded, said the Supreme Court, after long and careful consideration, that the only alternatives

were liquidation through a receiver or outright sale. There is no showing to that effect here, your Honor.

[fol. 461] The Court: Well, I can't go along with you on that, that there is no showing like that here, in view of that Lybrand-Ross report.

Mr. Nolte: Well, Mr. Mosman's affidavit filed in support of Diebold's motion for summary judgment says that at one time in '59—I don't want to attempt to quote exactly, but I am paraphrasing—that he considered the possibility of liquidation in his own mind; but he does not recite that he took any steps in that direction.

Then the Supreme Court says, "New orders were not coming in." That situation is not parallel here. The Supreme Court says, "Losses in 1929 exceeded $6,000,000." That situation is not parallel in any respect here.

"Surpluses of $4,000,000 in May of 1920," said the Supreme Court, "were turned into a $4,000,000 deficit within a year. In the spring of 1921," said the Supreme Court, "the acquired company owed $15,000,000 to 60 or 70 banks, plus $2,000,000 on current accounts." That situation is not in any respect duplicated here.

"Its capacity in 1921," said the Supreme Court, "was 38 thousand to 40 thousand pairs of shoes per day, but production was only six to seven thousand pairs." There is no showing here that production was below capacity.

The Court: I know. We don't expect to parallel that, but——

[fol. 462] Mr. Nolte: No, your Honor, not at all; but I am pointing out to your Honor some of the things which the Supreme Court passed upon.

Now, if I may, I will go to the specific report of what the Government is doing and has done and proposes to do. We were here before your Honor on November 18. On December 14 Mr. McGovern conferred with us and gave us the first of the Lybrand reports.

Immediately after that we made arrangements to have an experienced F. B. I. accountant work on this material, the Lybrand reports, the financial statements of the company. This man has, by reason of his responsibility to his superiors, been available to us since—not all the time; he

has been taken off for other jobs—but he has been available to us an appreciable period of time.

He has made tables and analyses, and on Thursday last Mr. Toohey and I were advised that he would make an affidavit, that he would cover in the affidavit some of the tables that he has worked up and the work that he has done, and that he would in that affidavit state his opinion as an experienced accountant concerning the over-all financial condition of this company at the critical time in 1959.

Now, that work has been going on steadily since we were first given the material by Mr. McGovern. We have assembled from the Bureau of Internal Revenue certified [fol. 463] copies of the recent income tax returns of Herring-Hall-Marvin, of Diebold, as well as of the Mosler Safe Company.

We have had tables made from those reports, and we will present data to your Honor by way of brief tables from those reports to show the comparative operating situations and financial conditions of those companies at that time, constituting the comparison most direct in this case.

We have completed these depositions of the Mosler Safe Company which we took in New York at the beginning of December. Those depositions have just been returned to us now, corrected and signed by the witnesses, and we will file those depositions immediately.

The Court: What do they show?

Mr. Nolte: They show the comparative competitive positions of these companies as known to the Mosler Safe Company, and while only to a limited extent relevant to this motion, they are, your Honor, relevant in certain respects to the motion on which your Honor is being asked to pass. We also have immediately in preparation the affidavit of an industry witness who was affected by this merger.

And finally, if the Court please, I would like to come to this question of other purchasers. This was discussed, as we know, before your Honor on Monday, and we have had the benefit of a discussion with Mr. Pennington, also a partial transcript from Mr. Crawford, and Mr. Crawford [fol. 464] read us that part of the transcript which had not been up to this point transcribed, so we are aware of the discussion concerning the other purchasers. On that score——

The Court: What do you mean, "other purchasers"?

Mr. Nolte: Other possible purchasers than Diebold of the Herring-Hall-Marvin Company at the time of the Diebold purchase.

If your Honor will recall, after we first conferred with Mr. McGovern concerning the basis for his proposed motion, we went back to the proposition that in September of 1959 the Government had moved for an order for the production of documents and papers relevant to the case.

As a result of that motion, a consent order for production was entered into. That motion and consent order covered documents relating to possible other purchasers at the time of this sale to Diebold. No such documents from the files of Herring-Hall-Marvin were produced to us or had been up until the time that this matter came up.

The Court: Well, do you have anything substantial to go on?

Mr. Nolte: Yes, I do, your Honor. First we served interrogatories upon the successor to Herring-Hall-Marvin at the beginning of January. In response to those interrogatories Mr. Mosman filed an affidavit and submitted certain documents showing correspondence with other pos- [fol. 465] sible purchasers, as your Honor knows, from the discussion on Monday.

Mr. McGovern on Monday covered the question of one of the three—and I am talking in general terms—of three other possible purchasers mentioned by Mr. Mosman in his affidavit and his production.

We too have been in contact with all these people and we have been in contact with them directly and were so immediately; and I won't go into the exact details there, but I myself have been in touch with them by phone.

Now, Mr. McGovern mentioned and produced an affidavit that he had had from one. I have worked through the attorneys representing the other two people. Both of them sought to consult their attorneys before going further with the Government. We respected that, as we must do. But I have myself directly reports from both of the other two to the effect that they have documents in addition to those produced by Mr. Mosman relating to their negotiations with Herring-Hall-Marvin Safe Company.

I received one hour before I left Washington on Monday a letter from one of these people, written to the Department at my request, in which he says, among other things:

"An examination of my records indicates that my first contact with Herring-Hall-Marvin Safe Company was some time in the middle of 1958. My records further indicate [fol. 466] that by August 1958 negotiations had progressed to the point where I went to Hamilton, Ohio to meet with Mr. Mosman and look over his facilities. Negotiations proceeded until we learned that Mr. Mosman had sold the company to Diebold."

Mr. McGovern: Would you identify the writer of that letter, please?

Mr. Nolte: I would be glad to. This is Mr. Boyce of Baton Rouge, Louisiana.

"As I explained to you over the telephone, we were in serious negotiations with Mr. Mosman." And then there are some additional details, and then he winds up:

"As I recall, we discussed many possibilities between ourselves. It is possible I could shed more light on the subject upon a more detailed consideration. I do want to be on record as saying that we were definitely interested in acquiring Herring-Hall-Marvin Safe Company and had devoted considerable time and money towards this end."

Now, the other, the third of the prospective purchasers mentioned in Mr. Mosman's production and affidavit is the Lovell Manufacturing Company of Erie, Pennsylvania. I have been in contact with them several times. I have word coming from them which may well be in Washington at this time.

And in that connection, if I may, your Honor, I want to refer you just briefly again to some of the things the Supreme Court said in that International Shoe case.

[fol. 467] The Court: No. I knew enough about that now.

Mr. Nolte: They mentioned this business of other purchasers, not once, but twice in that case, in the terms of their was no other purchaser available.

Now, these other purchasers in this situation, not only have given us the information which I have just now recounted to your Honor, but they have also indicated that they were negotiating on the basis of an over-all price of

$3,000,000, which is the price that the Diebold Company bought the Herring-Hall-Marvin Safe Company at. I do not have at this time in all respects their statements as to the surrounding terms, but it has been fixed that the negotiations in those cases were at the same purchase price.

Now, these are the things, some of the things, among others, your Honor, which the Government has been doing and is doing, and they are the basis in detail for the outline in the affidavit which was made by the Government in support of its application here.

And I could say more about various aspects of the thing, your Honor, but I would like at this time to close by referring specifically to one proposition which has come out; and that is that Mr. McGovern has talked about the fact that the Diebold people have only gone into this matter recently.

In that connection certain of these facts regarding the cash position of the Herring-Hall-Marvin Safe Company [fol. 468] came to the attention of the Diebold people before the negotiations were concluded, before even the option agreement was signed. They went ahead nonetheless. The affidavit of Mr. Robinson, filed here with your Honor in support of Diebold's present motion, recounts a number of aspects of that history of negotiations at that time. I would just like to point out to your Honor one reference in that affidavit:

"Examination and audit of the books of account of HHM immediately upon Diebold's taking possession of them reflected the fact that the company had suffered operating losses between July 1 and September 10, 1959, of $206,000."

The Court: Well, did they know anything about the other suggestions in Lybrand-Ross that, instead of having assets and balances, they actually had deficits? Did he say anything about that?

Mr. Nolte: What they knew in detail at that time, I am not sure, your Honor; but they knew before they signed the option that the April 30, 1959 balance sheet, which Mr. Mosman had offered them, could not be verified by them as far as the cash shown in that balance sheet.

They knew further at the time of the closing itself on September 11, 1959 that he could not give them checks on the bank accounts for the amounts shown on the bank ac-

counts at that time. Also Mr. Robinson's affidavit shows that they put engineers in there, consulting engineers, [fol. 469] right after this time and that they continued to look into the financial situation.

The Court: It was in bad shape then.

Mr. Nolte: Pardon me?

The Court: It was in bad shape then.

Let me ask you this: Now, what did you gain or what do you expect to show as a result of that deposition taken yesterday?

Mr. Nolte: The deposition yesterday, your Honor, we went through the 1959 period because we were limited by your Honor's ruling to that period. We examined Mr. Ziegler of the bank and Mr. Fitton, the chairman of the board.

We examined them on the bank accounts as contrasted with the figures shown in the Lybrand reports. We examined them on the question of the short-term loans.

The Court: Well, did that testimony verify the Lybrand-Ross audit?

Mr. Nolte: It neither contradicted it nor verified it. It showed that the bank always had a balance on its books in favor of Herring-Hall-Marvin Safe Company. And I may say, your Honor, that we learned only on February 2d that the bank books might well show that there was always a balance in the bank.

And in that connection I would just like to call your Honor's attention to a statement in Mr. McGovern's mem- [fol. 470] orandum in support of his motion here. He says, on page 2:

"At all times between June 1950 and September 10, 1959, when HHM was acquired by Diebold, HHM had been short of working capital, and from 1953 on it had been necessary to make frequent use of bank loans on a straight note basis to finance the company's annual sales volume."

Now, we think, in the first place, that the examination of Mr. Fitton brought out evidence in that regard. We think further that, since Mr. McGovern himself has gone back to 1950 and 1953, that our attempt was a very modest and circumscribed one to go back to the middle of 1956

to see what the short-term loan history was there during that period.

And Mr. Fitton testified about 1959 yesterday, and he produced the loan records for that period and for the earlier period; but we were not able to examine him on any period back of 1959.

The Court: What difference would it make? That's water over the dam, isn't it?

Mr. Nolte: I think it might make a lot of difference, your Honor, if the pattern for 1956 and '57 and '58 and '59 were all the same, or substantially the same, and if the loans outstanding ran about the same way; that doesn't indicate any critical change in the company's financial position as of 1959. It was in the same position it was in [fol. 471] in 1958.

And if the company was in a failing condition in 1956, it would be a striking circumstance that it was still in substantially the same position in 1959.

The Court: Well, isn't it a fact that they could have come into Court and showed by their honest balance sheet that they were ready for reorganization rather than that they could continue? Isn't that about——

Mr. Nolte: Well, there is no balance sheet of the Herring-Hall-Marvin Safe Company submitted to your Honor yet.

The Court: No. All I know now is the re-audit. I have seen the re-audit. I saw what was first presented here; and when I suggested then that this looked like they were in a failing position, that was apparent right on the face of it.

Mr. Nolte: Well, in short, your Honor, we have gone into these proofs that have been submitted in support of their motion and we have done this work and are doing this work I have described to your Honor; and we don't think this is the whole picture that your Honor needs in order to dispose of this motion.

We think that our request for a short amount of additional time is reasonable and necessary, and that's why we are here this morning; and we would like your Honor [fol. 472] to consider our application in that connection so we can tie the thing up once and for all. We would welcome a submission of the matter on this motion on the basis of the affidavits and depositions and proofs that

we would submit to your Honor in addition to those which have been submitted in support of the motion.

The Court: Well, how long will it take you to do that? Not 60 days. Now, we can't——

Mr. Nolte: We didn't ask for 60 days, your Honor. We suggested in our affidavit March——

The Court: Ask Mr. Pennington if he didn't ask for 60 days.

Mr. Pennington: I asked for 60 days from January 18th, or until March the 20th.

Mr. Nolte: Correct, your Honor. That's what we understood.

The Court: Well, that's 60 days.

Mr. Nolte: We had talked to Mr. Pennington. You see, we gauged that in several ways. We were here on November 18. We were given the Lybrand material on December 14. Their motion was filed on January the 18th.

And in terms of the work we have done and are in the midst of doing, we calculated it in relation to that history and in relation to the situation that the Government was in as of that time, and we suggested March the 20th. [fol. 473] Now, we realize that March the 20th was your Honor's motion day, and we understood from Mr. Pennington when we talked to him on the phone last week that your Honor might want to choose a different date than that.

The Court: Oh, we would have to because he asked for a full day's argument.

Mr. Nolte: Well, we think in order to cover this matter, it will take some time to argue it, yes.

The Court: Well, what I think is missing is some substantial and relevant evidence to justify the position of the Antitrust Division here in trying to block this deal. Now, where is there any evidence in the record at this point on which this Court can go ahead and——

Mr. Nolte: Well, that goes to the whole merits of the case.

The Court: Well, I know, but the burden of proof is on you and we have to have some relevant evidence. That's the big thing.

Let's hear what Mr. McGovern has got to say.

Mr. Nolte: Well, we will supply evidence of that sort

to your Honor by affidavit in opposition to these motion papers, and we will bring that in.

The Court: Well, I don't think affidavits are sufficient. You have to have some evidence.

Mr. Nolte: May I just add this, your Honor?

[fol. 474] The Court: Yes.

Mr. Nolte: You know, I mentioned the Mosler depositions which we took in December, which we are now ready to file.

The Court: Yes.

Mr. Nolte: Those Mosler depositions certainly contain evidence relevant to the Government's position in this case on the violation.

Mr. McGovern: On the failing company proposition though, Mr. Nolte?

Mr. Nolte: No.

Mr. McGovern: No. That's the point.

Mr. Nolte: I said before, if I may remind you, that I deemed the Mosler depositions of limited relevance.

The Court: Mr. Toohey has got something to say to you.

Mr. Toohey: Yes, your Honor. I would like to say that I think there is a little confusion developing here. There is a discussion about the merits of the case and our evidence going to the violation, and then the soundness of our claim at this time on the fact Mr. Nolte has presented as to why we should have a few more days to get our motion papers in.

The affidavits which we have been talking about are required under Rule 56. The motion is on affidavits. So, [fol. 475] necessarily, your Honor, whatever evidence goes in will be by way of affidavits, plus the depositions.

The Court: You can't cross examine affidavits.

All right; let's hear what Mr. McGovern has got to say.

ARGUMENT BY MR. MCGOVERN

Mr. McGovern: Your Honor, let me, if I may, please, because I feel very keenly about this situation that confronts us, particularly in view of the dreadful predicament of that plant down there in Hamilton—let me start out with that, your Honor.

Our controller has just sent up to me some figures on

employment in that plant down there (handing paper to Court). I have served the Government with these. This data, Judge Druffel, reflects the fact that when we took over that plant on September 11th, 1959 there was a total of 664 employees. On Janua y 31 of this year there were 465. Between February 1st and February 4th of this year we were compelled to lay off 95 employees, cutting the total down to 370; reflecting, sir, a total over-all reduction of employees in that plant of 294, as against the original total employment of 664. That's about a 40 percent decrease in employment.

Now, it was only last weekend, Judge Druffel, that the papers out here were full of headlines of Secretary Goldberg coming out here at the instance of President Kennedy to examine into the distressed unemployment [fol. 476] situation in Ohio, among other states. And as your Honor knows, Hamilton itself is a distressed area; and you haven't got a better indication of why than these figures here.

Now, that's the situation that confronts me. It isn't a theory. It doesn't take an F. B. I. accountant to explain this. That's a fact, not a theory. People are out of work, and that's what I have got to deal with right now and that's what my client has to deal with. Now, let's have that fact in the back of our mind when they talk about what we can't or can do.

Now, taking up the Mosler deposition: The Mosler deposition hasn't got anything to do, not the remotest, in any way, shape or form, with the failing company doctrine.

The Court: Aside from that, aside from the failing company doctrine, what does it say?

Mr. McGovern: I would say the Mosler deposition doesn't prove anything except what their original affidavits in this case did, that there is plenty of competition up and down the line on every single product line in the case. It's all vague, general material on that.

They asked Mr. Mosler who was selling this line of goods, and he would name a flock of manufacturers. You can't make anything out of that except that there is plenty of competition, which in fact we know, as witness the situation down here. But it has no bearing on the problem before us [fol. 477] right now, which is whether or not we have given

your Honor a sound, conclusive demonstration of the fact that this company was failing at the time that we purchased it because, if we have done so, Judge Druffel, under the Supreme Court's decision, that's the end of the inquiry here.

We don't have to spend six more years with these fellows gumshoeing around trying to find out whether the competition was here or there or somewhere else. We have come to the end of the case.

Now, he suggested that the bankers' deposition yesterday did neither confirm nor contradict the Lybrand-Ross report. Let me respectfully disagree with Mr. Nolte. I would say 90 percent of the examination yesterday was like all such examinations, wasted; showing them checks and debits and accounts and so forth.

But when it came to the Lybrand-Ross report, I also suggest that the bankers' testimony clearly confirms every one of those red figures on the Lybrand-Ross report, with specific regard, your Honor, to the fact that, as Lybrand-Ross shows, Mr. Mosman couldn't meet his payrolls.

Never mind his creditors, his banks, anything else; he couldn't meet his employees' payrolls in the month of May. The one month where we have a day-by-day, expensive and costly but nonetheless, conclusive order, he couldn't meet his payrolls. Mr. Nolte took Mr. Ziegler right down through [fol. 478] those, item by item, and we supplied the checks, the overdrawn checks on the reimbursement of the payroll account, to show the impact of that.

To make a long story short, after about 40 pages of transcript, at page 88 I asked Mr. Ziegler:

"Let me ask you, Mr. Ziegler: From the reimbursement of the payroll account, since Mr. Toohey has just taken you through it, does it not appear that the Herring-Hall-Marvin Company wrote its payroll checks on a Friday night and did not succeed in covering all of those outstanding checks until the following Thursday or Friday?

"The Witness: That's what it appears on this particular display.

"Mr. Toohey: You are referring to Schedule C?

"Mr. McGovern: Yes, the schedule that you just went over."

Now, the schedule we are talking about is the Lybrand-

Ross Schedule C, and that's what the witness yesterday confirmed.

Let's come to the general question as to whether or not Mr. Mosman's affidavit about having lived from hand to mouth down through the years on short-term bank loans is concerned. Let's come to that point, your Honor. The bankers did produce at the request of the Government a bank statement showing the loan accounts of Mr. Mosman, [fol. 479] I believe from 1951 down to the present—Down through 1959.

Do you have that here?

Mr. Nolte: That is substantially correct (handing papers to Mr. McGovern).

Mr. McGovern: Now, because of your Honor's limitation as to the scope of the examination yesterday, to confine it 1959, the year when we have the critical question, "was Herring-Hall-Marvin failing when we bought it?" because of that, the examination of these loan sheets was confined by Mr. Toohey, Mr. Nolte too, to 1959. I will come to that in a moment, Judge Druffel.

However, these sheets, as the bankers testified, do go back to 1951. They reflect the entire history of loan relationships between Mr. Mosman and his principal banker, the First National Bank and Trust of Hamilton. In order to meet this charge which they made yesterday, and they now make again, that they wanted six or seven weeks to test out the veracity of Mr. Mosman's statement that he lived from hand to mouth on short-term bank loans, I suggest, Judge Druffel, we lift the temporary ban against going back beyond 1959 as to this particular exhibit and let it go in for the entire period, back to 1951.

It shows conclusively, Judge Druffel, that beginning in 1951 he began to have demand notes, 90-day revolving demand notes, at the First National Bank. He had them; [fol. 480] he would pay them off. He would get them out; he would pay them off. He would get them out; he would pay them off, right down to the bitter end. I mean there is the answer in terms of the statements Mr. Mosman makes. There is the proof of it.

Let's look at the bitter end. The testimony in this transcript yesterday by Mr. Fitton shows that on December 30th, 1958 Mr. Mosman borrowed $250,000 on a de-

mand note from his regular bank, the First National Bank and Trust of Hamilton. He had a line of credit with them up to $300,000, which both bankers testified yesterday, Judge Druffel, was the legal limit for them. They couldn't have granted him another nickel.

He started out on December 30th, 1958—and this is set forth in the transcript at pages 108 and following that. As time went on, things got tighter and tighter. Then he came to that critical period in May when he couldn't even meet his payrolls. He then went to the bank and he borrowed an additional $50,000, making his total borrowings as of that moment $300,000.

The bankers testified that they became anxious about his situation and suggested to him that they didn't like to loan their entire legal limit on an indefinite demand basis, and they suggested to him that he try to turn that loan over and reduce it. He managed to pay $50,000 off on it, by hook or by crook.

[fol. 481] But come September, he is really broke. He now has that balance, your Honor recalls, of $13,92 in the bank. Lybrand-Ross shows he has outstanding at that time checks in the amount of $57,000, which are not covered. He then goes back to the bank on September 10th, the day before we bought them, and borrows again, the entire limit. He borrows an additional $50,000 from the bank.

And at that point it's quite clear that the bankers were extremely concerned about this situation; and I would just like to read you the testimony of Mr. Fitton in that regard. Mr. Fitton is the president of the bank with which Mr. Warren Mosman had been dealing for 10 years.

I showed him the actual running account figures from HHM's own current cash sheets, which reflected, as we point out in our brief, that as Lybrand-Ross shows—reflected, your Honor, that he was overdrawn. He had overdrafts outstanding in all banks across the country, principally, of course, in the First National of Hamilton; but in all of his banks he was overdrawn in very substantial amounts all during September. He had been for the preceding nine months too, but in September it was just red figures solid right across the board, indicating these checks

all out floating around; and if they ever hit that bank on a critical date, of course, he was done for.

But I said to the banker, Mr. Fitton:

"Moving down now to the month of September, your [fol. 482] date is over here, going down to the 10th, coming across on the tenth line. There you will note, will you not, for the First National Bank, red figures throughout the month, in terms of checks outstanding?"

Answer: "Uh-huh."

Question: "And, coming over, sir, to the final column, which is the total of all bank accounts——"

Answer: "On the 10th."

Question: "—10th, the second line down in here, you will notice red figures, with the exception of September 1st when there was $7,800 total in all banks across the country. There was, was there not, a subsequent deficit, first of $20,000, $25,000, $47,000, $27,000, $40,000 and on September 10th itself a deficit in all bank accounts of $41,000?"

Answer: "(Nodding.)"

Question: "Now, in view of that state of Herring-Hall-Marvin's finances, Mr. Fitton,——

Mr. Nolte then objected to the question I asked.

I asked again: "In view of those facts that have just been set forth on that exhibit to which you testified, Mr. Fitton, suppose that any time during the first ten days of September the first National Bank had felt for any reason called upon to request Mr. Mosman to pay off that demand note, where would he have obtained the funds?" [fol. 483] Answer: "He wouldn't have. I don't know where he would have gotten them."

Then I asked him finally, "Well, it did get paid off?"

He said, "Yes, it did."

I asked him who paid it off, and he said Diebold after we took over.

Now, the simple fact of the matter is that the one thing that that transcript does demonstrate, Judge Druffel, is that literally Mr. Mosman was bleeding to death from about April of 1959 right down through the closing.

Now, let's just run back briefly over some of these other points they make. They say that in the Shoe case you had a marked recession. The Lybrand-Ross reports in-

dicate pretty clearly, Judge Druffel, that Mr. Mosman got caught up in what used to be known as the "rolling Eisenhower recession," which we now think maybe was the beginning of a depression.

But anyhow, his trouble began in 1957. That's then a troublesome date from that date to this for all American industry. Of course you have got a recession. Of course, we are now becoming concerned about just how deep a recession it is.

They say that Shoe's inventory built up. The Lybrand figures reflect that Mr. Warren Mosman's inventory built up $300,000, which is almost the amount by which his sales [fol. 484] went down. And it's perfectly clear, your Honor, if you have got ten cents in the bank and $300,000 of your bank debts frozen in inventory and your sales fall until nobody is coming in, you are in exactly the critical point that he was in; and those facts show he was all during the first nine months of '59.

They say there is a reflection in this book that the McElwain Shoe Company had need for cash. Well, the one thing that the Lybrand-Ross report shows, confirmed by the testimony of the bankers, is that this man had a crying need for cash all during his corporate life, but particularly from '57 down. As the sales fell off, his inventories built up and his working capital got used up. A man who issues payroll checks, your Honor, without sufficient funds to cover them is certainly a man who needs working capital.

New orders, they say, that McElwain lost new orders. I point out that Mr. Mosman lost approximately $300,000 in orders in each of the years '58 and '59. Now, for a man doing a nine to ten million gross business, that's a serious loss. Those figures are set forth. They are not challenged.

Now, he says that he has an F. B. I. man who is going to go over the Lybrand-Ross report and maybe give us an affidavit of some kind. Can the F. B. I. man challenge the authenticity and veracity of those figures any [fol. 485] more than these bankers could?

The Court: I don't see how he can.

Mr. McGovern: That's exactly my point. He may disagree with us but, your Honor, the decision as to whether

or not we have met the failing company doctrine is a decision for your Court. It's a conclusion. No affidavit from an F. B. I. man or from a banker or from anyone else is going to have any pertinency to that situation.

You have got the facts there. Nobody challenges those facts. They say: "Well, give us some time. We might come up with more pie in the sky or something else."

Mr. Nolte: I beg your pardon. We do challenge those facts.

Mr. McGovern: What facts do you challenge? Stand up and tell us which ones you challenge.

The Court: May I suggest something? It's a little remote. Something has been running through my mind. I know something of the history of some of those Hamilton companies.

I remember—I can't think now of the name of the company, largest machine tool outfit in Hamilton. I had it in Common Pleas Court a long time ago and we had to sell them for practically nothing. Herring-Hall-Marvin may have figured in there.

I just have something in my mind about what caused the making of Hering-Hall-Marvin. It wasn't always that [fol. 486] way. It was the result of mergers. That's been the history.

Mr. McGovern: That's right. Now, your Honor, coming —Well, just let me raise one more question. This also got nailed down in the record yesterday because I showed these checks to the bankers.

Mr. Mosman was so tight on cash, your Honor, that he was writing checks on this order (indicating), and this is absolutely incredible to me. I am sure it will be incredible to the F. B. I. accountant because, after all, an F. B. I. accountant is just like the rest of us; he can only add the figures upon and down. That's all he can do.

Here is a check to the Rockford Machine Tool Company in the amount of $101,000 dated December 15th, 1958. These were all, your Honor, dated September 15th, 1958. It's paid by the bank on January 2d, 1959, six months later on. Here is a large check dated February—Well, here is one, February 17th, 1959, Aluminum Company of America in the amount of $5,519, paid on May 13th, 1959. Any number of them, your Honor. Aluminum Company of America,

$10,000, February 17th, 1959, paid by the bank on May 18th, 1959.

Now, the bankers testified they didn't hold the checks.

The Court: What?

Mr. McGovern: The bankers testified yesterday they didn't hold the checks. Their cancellation stamp shows [fol. 487] when it came in, and you know that Alcoa didn't hold those checks.

Now, let an F. B. I. man try to explain that kind of monkey business. Let an F. B. I. man explain payroll checks going out without funds covering them. Let an F. B. I. man explain, or Mr. Nolte tell, how it happens that this company which he says he doesn't think was failing, was in fact, on about 40 percent of its working days, from the 1st of April down through September 10th overdrawn, not only in its Hamilton account—it was frequently overdrawn there—but it was overdrawn on every one of its accounts throughout the country. There were checks outstanding floating back and forth——

The Court: Well, that was the experience that I had with this big machine tool case in Hamilton some years ago.

Mr. McGovern: Yes, I gather the same type of experience.

The Court: It was about the same facts; and it's just some years back, as I remember, when there were three safe companies that finally merged into one.

Mr. McGovern: Herring-Hall itself was a merger of Herring and Hall, and I forget the other safe company—Marvin. I guess there was three of them, yes.

Well now, just let me address myself to one additional thing, your Honor. That's this question about these other [fol. 488] purchasers they talk about.

The Court: Yes.

Mr. McGovern: From the testimony that the bankers put in the transcript yesterday, I say that it is absolutely clear that, while they loved Mr. Mosman, they knew him well, they were anxious to keep that firm there and keep it operating and, as local bankers who were conscientiously dedicated to their community, they were anxious to help. Nonetheless, they knew under Federal banking rules and good sound banking practice they could not carry indefinitely a $300,000 demand note, which was not even revolved from time to time.

They testified that they indicated to Mr. Mosman that they would like him to do something about that just as soon and just as fast as he could. Well, Mr. Mosman couldn't do it. He was overdrawn at that time in terms of drafts outstanding everywhere. We paid that note off, Judge Druffel.

Now, it is perfectly true that you find here some suggestions that there were a few con men floating around who had the bright idea that if they could get ahold of Mr. Mosman and get him to give them some kind of authority to sell at some kind of a phoney deal price they could work out, they would then be able to go around and see if they could find a buyer, the old solicitation come-on game that we all get exposed to all the while.

The point is though, as Mr. Mosman testified and as his [fol. 489]—rather, as his own affidavit shows, he needed to make a sale for cash; and as he said and as the record shows, Diebold alone offered to give him three million dollars in cash, and he needed it and needed it badly.

The rest of these offers on the face of them are offers where somebody said: "Let me take over your company for a nickel down, dime a week, and I will exchange your stock with somebody over here and maybe I might make some money out of it in the meantime. Never mind what happens to HHM."

Let's take these cases he talks about. The case of the Lovell Manufacturing Company, the so-called Pennsylvania company, in Mr. Mosman's affidavit he swears:

"Informal discussions between affiant—" that's Mosman —"and representatives of Lovell led to a meeting in New York in April of 1959." That was just shortly before he came to us. "Affiant—" that's Mosman—"indicated that the Company would not sell its assets for less than approximately $3,000,000 in cash. He was immediately advised that the Lovell Manufacturing Company was not interested in buying the Company under such circumstances."

What are we going to find out from Lovell now? They want to spend some weeks interrogating the Lovell people. This was simply a question of money, your Honor. When the man was in the circumstances he was in, with payroll checks outstanding, he couldn't cover, he couldn't afford to negotiate.

[fol. 490] Take the case of the New York bank. "In 1959 affiant was contacted by the Bank of New York as to whether he was interested in disposing of his interest in Herring-Hall-Marvin. The Bank of New York apparently was writing on behalf of Mr. T. C. Davis, of 230 Park Avenue. Affiant indicated that he was not interested in selling his interest in the Company. There was no further contact between the parties——" Now, I myself would concede that, standing alone, that's ambiguous.

So we have an affidavit from the bank that I called your Honor's attention to the other day.

I won't read this all over again. Just let me read you the first paragraph to show you the kind of a con man game that goes on in this country and, of course, your Honor knows it. This banker says—This is an assistant treasurer and obviously he is just going beyond the scope of his authority in negotiating this kind of a deal.

"In the spring of 1959, it came to my attention through Mr. Arthur L. Lindley, New York Branch Manager of Herring-Hall-Marvin that Mr. Warren Mosman might possibly be interested in discussing a disposition of H. H. M."

In other words, Judge Druffel, this man Van Ness of the bank hears about this thing as a possibility through the branch manager of the Herring-Hall-Marvin Company. He never talked to Warren Mosman. Warren Mosman never [fol. 491] told him he was interested in discussing it. This is sheer rumor and gossip. Now, what does he do with it?

"At about the same time, I also learned——" This is a great man for learning things, you see. "At about the same time, I also learned through Mr. Robert A. Ward of Ebasco Services, Inc., that Colonel T. C. Davis had a continuing interest in attractive investment opportunities, and specifically might have same possible interest in trying to arrange an exchange of H. H. M. stock for that of some company in which Colonel Davis was presently interested."

The Court: Well, isn't it a fact that all those New York bank vice presidents are interested in checking for some of these mergers?

Mr. McGovern: They surely are, for a personal, financial reason; they would like to do the financing of that. But it's absolutely nonsensical to say that there was a serious offer by any of them.

Now, let's take this man down in Baton Rouge.

The Court: I was interested in what you have got to say about him because of Mr. Nolte's statement that he was real serious about it.

Mr. McGovern: All we know about that is in terms of a single letter from Mr. Cross, a very well-known lawyer in Washington. This is not written by Mr. Cross: It's written by his secretary. It says:

[fol. 492] "Dear Mr. Mosman:" It's dated April 13th. "Mr. Cross asked me to write you this morning and let you know that he had hoped to have gotten in touch with you last week, but the week somehow slipped by before he got to it. He left for Europe on Saturday and I am sure he will not be gone for more than about ten days. He will be in touch with you as soon as he returns."

Now, as to that incident, Mr. Mosman swears in his affidavit: "In 1959 affiant was advised through John W. Cross, of 729 Fifteenth Street, Washington, D. C., that Mr. James Boyce of Baton Rouge, Louisiana, and a representative of Hayden Stone and Company——" Now, this is the point about this one, Judge Druffel—"Hayden Stone and Company, New York, New York, might be interested in acquiring the assets——" Mind you how these things all start out. They might be interested in acquiring the assets. Nobody ever comes forward and says, "Here is $3,000,000. Will you sell?"—"might be interested in acquiring the assets or the stock of Mosman Industries, Inc.

"An oral offer was made to acquire all the assets, except land, buildings and life insurance, for $3,000,000. To the best of affiant's knowledge and belief, the offer provided that the purchase price should be paid one-half in cash and one-half over a long term, to be secured by a mortgage on the assets. Since the Company was interested [fol. 493] only in a sale for cash, it never acted on the offer and no further contact was made."

Now, in the light of what he tells us today, presumably he has got some fellow down there, this Boyce, who is thinking, "Well, If I only had a chance, I might have. I might have. I might have." The fact is, Judge Druffel, at that very point Warren Mosman was bleeding to death. He couldn't afford to wait for a group of brokers to sit

down and play poker with his assets. He had to have three million. He had to have it cash. We offered it. We bought the company. We have been in a dreadful shape ever since.

Now, I am saying that I don't think—frankly, I genuinely, honestly don't think that they can justify one minute's more delay in getting to the issue in this case at this moment, which is a failing company.

Now, just let me remind your Honor once more that the Supreme Court says:

"In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not for the purpose of lessening competition, but to facili- [fol. 494] tate the accumulated business of the purchaser" does not violate the law.

Now, the Government has read into that parenthetical statement, "there being no other prospective purchaser," apparently a tremendous amount—As a matter of fact, if you read the case, the Court was merely reciting a fact of record here, that there was not other prospective purchaser.

But as I pointed out to you on Monday, the Court does indicate that: "It was suggested by the Court below—" and the Federal Trade Commission, both raised these hypothetical possibilities.

"It was suggested by the court below, and also here in argument, that instead of an outright sale, any one of several alternatives might have been adopted which would have saved the property and preserved competition; but, as it seems to us, all of these may be dismissed as lying wholly within the realm of speculation. The company might, as suggested—" And this is one of their favorite suggestions. "The company might, as suggested, have obtained further financial help from the banks, with a resulting increased load of indebtedness which the company might have carried and finally paid,—" might have—"or, on the other hand, by the addition of which, it might more

certainly have been crushed. As to that, one guess is as good as the other."

And they say: "We can't face up to that kind of spec-
[fol. 495] ulative facts. There is no way to weigh them." Now, I am saying those very arguments were made in this case.

The Court: Well, of course, over the years we have had a number of reorganizations, some very big ones; and they are always coming in with the proposition, give them two or three more weeks, they are going to get somebody else to take it over, this, that or the other thing; and they never show up.

Mr. McGovern: That's right. Let me just suggest one other thing, and I don't want to characterize it, but these checks that I just read your Honor indicate to all of our minds—and with respect to a remark made by Mr. Nolte, the fact is that when we bought the company, we frankly had no idea of this type of thing.

The Court: Well, that's what I would think.

Mr. McGovern: But these checks do indicate, for example, he was picking one creditor out, you see, and preferring him over the rest. He couldn't pay them all. In fact, during most of this period of time his overdrafts outstanding were more than he could cover by his bank statements. So, we had a man, had Alcoa known what was going on and they had indicated to him to pay his bills, they could have come into your Honor and asked to have more redress under our bankruptcy laws.

Well, that's our situation, Judge. I say I cannot con-
[fol. 496] ceive in good faith, the utmost good faith, what additional data they propose to develop for your Honor that will have some relevance before your Honor to the failing company doctrine.

I will make this offer, that if Mr. Nolte will stand up and say what he thinks this fellow Boyce from Baton Rouge, Louisiana will say, let us just hear it and let me consider whether I can stipulate that Mr. Boyce, if called and put in that witness stand before your Honor, would say that. What's its relevance to the case?

Mr. Nolte: I will not testify for Mr. Boyce at this point. He is represented by an attorney in Washington, and I am working through that attorney. I want to get a statement from him.

The Court: Let me say this: From what you have produced here, the possibility—that's all it is, a possibility—that he was interested to the extent of taking it over is pretty remote. It's too remote to give serious consideration to.

But I tell you what. I don't want to just be arbitrary here, but frankly I am ready to approve the motion for summary judgment; but we will give you until March the 1st to come up with something substantial.

Meanwhile, I suggest that you prepare a separate findings of fact, conclusions of law and a separate judgment [fol. 497] entry, proposed, and have it ready on that day.

Mr. McGovern: All right, your Honor.

Mr. Nolte: You don't need findings of fact, conclusions of law and a judgment entry on a motion for a summary judgment.

Mr. McGovern: Yes, you do.

The Court: Well, the Court of Appeals has decided both ways.

Mr. McGovern: Yes, we do, and I would rather have them.

Judge Druffel, I think I forgot to mention this, but let me make this point, that, of course, this is a civil suit, and an appeal from any decision goes directly to the Supreme Court.

I have emphasized that the Supreme Court has said that summary judgment is the way to dispose of this.

The Court: Well, I would like the case to go directly to the Supreme Court too.

Mr. Nolte: Will you have a further hearing on the 1st, your Honor.

The Court: Well, I will give you an opportunity to come in with anything that's substantial and relevant.

Mr. Nolte: May we be heard on that date?

The Court: Well, I don't—If you come up with something substantial. We have had a number of hearings on it.

[fol. 498] and I am still not satisfied that you have any relevant evidence——

Mr. Nolte: That's the date your Honor is fixing for the filing of our opposition papers.

The Court: If you have anything to say at that time, we will consider it. But meanwhile I would like you to have your proposed findings of fact, conclusions of law and a separate judgment entry prepared in case we go ahead and sign it.

Mr. McGovern: I will have them, your Honor, for submission. I will try to submit them, frankly, before that date and I will try to give the Government a copy before that date so they can really pinpoint their fire if they have any.

The Court: Well, I just simply again suggest that it appears to me than this is a case where the Government ought to come in and say that the facts are, as it appears now, that you didn't know then that this was a failing company and couldn't stand up. That's the truth of the matter as I see it.

Mr. McGovern: I believe it.

The Court: Well, I am willing to settle for Lybrand-Ross'—Now, they do have the necessity of proving their case. So, in your proposed findings of fact, suggest that there is no substantial evidence to justify what they are bringing suit on in the first place.

Mr. McGovern: All right.

[fol. 499] The Court: If they had known then what they know now as a result of those audits, I doubt whether they would have gone ahead with it.

Mr. McGovern: Judge Druffel, let me say this, that if we had known then what we know now, there probably wouldn't have been an acquisition. That plant would have been closed by now.

The Court: We would have had it for reorganization.

Mr. McGovern: I think so.

The Court: We will recess until 2:00 o'clock.

(Thereupon, at 12:12 o'clock P.M., the hearing in the above-styled action was continued until March 1, 1961.)

[fol. 500] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF MILTON SINGMAN—Filed March 1, 1961

District of Columbia, ss:

I MILTON SINGMAN, being first duly sworn, depose and state:

That I am employed as a Special Agent Accountant by the Federal Bureau of Investigation of the Department of Justice, and have been so employed since July 6, 1936. I hold a degree of Bachelor of Commercial Science and a degree of Master of Commercial Science.

That is part of my official duties and pursuant to the request of Robert A. Bicks, Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, I have made a study of the financial operations and statements of the former Herring-Hall-Marvin Safe Company, Hamilton, Ohio, on the basis of a) the company's published financial statements for the fiscal years ending June 30, 1955 through June 30, 1959 which are attached as Exhibits 1 through 5 hereto and made a part of this affidavit (the financial statements bear the certification of the Certified Public Accounting firm of Lybrand, Ross Bros. & Montgomery), b) a report prepared by Lybrand, Ross Bros. & Montgomery for Diebold, Incorporated, dated December [fol. 501] 19, 1960, and entitled "Herring-Hall-Marvin Safe Company, Summary Schedules of Assets, Liabilities, Shareholders' Equity and Operations for periods ending December 31, 1944 through June 30, 1959" (the report has been filed by Diebold, Incorporated, as Exhibit C in support of its motion for summary judgment), and c) a report prepared by Lybrand, Ross Bros. & Montgomery for Diebold, Incorporated, dated January 3, 1961, and entitled "Herring-Hall-Marvin Safe Company, Comparison of Company Statistical Data with that of Industry as of June 30, 1951 through 1959" (the report has been filed by Diebold, In-

corporated, as Exhibit D in support of its motion for summary judgment), and that from these documents I have prepared summary tables and schedules, true copies of which are attached as exhibits hereto and made a part of this affidavit.

A. That the published financial statements of the Herring-Hall-Marvin Safe Company show:

A. 1) That the company was earning money during each of its fiscal years ending June 30, 1955 through June 30, 1959; that its average annual profit after taxes during those years was $202,876.42, an average annual return on investment of 11.16% after taxes; and that the company's income after taxes for its fiscal year ending June 30, 1959 was $187,602.73, a return on investment after taxes of 8.98%. Exhibits 1, 2, 3, 4, 5, and 6, Table 1.

A. 2) That the retained earnings account of the company during its five fiscal years June 30, 1955 through June 30, 1959 showed continual growth, and that the company's retained earnings as of June 30, 1954 totaled $1,231,268.96 as compared to $2,247,986.98 on June 30, 1959, an increase of $1,016,718.02 or 82.57 per cent. Exhibits 1, 2, 3, 4, 5 and 6, Table 2.

A. 3) That the company declared a dividend of $2.00 per share each year during the period June 30, 1955 through June 30, 1959. Exhibits 1, 2, 3, 4, 5 and 6, Table 3.

[fol. 502] A. 4) That the book value of the stock of the company as of June 30, 1955 was $253.72 as compared to $392.77 on June 30, 1959. Exhibits 1, 2, 3, 4, 5 and 6, Table 4.

A. 5) That the working capital position of the company showed an improvement from a ratio of 1.36 in 1957 to 1.77 in 1959; and that the working capital of the company as of June 30, 1958 was $1,268,318.55 as compared to $1,495,731.12 on June 30, 1959, an increase of $227,412.57. Exhibits 1, 2, 3, 4, 5, and 6, Table 5.

A. 6) That during the fiscal year ending June 30, 1959, the company reduced its liability on notes and loans payable from $708,234.12 to $297,865.07; that the firm had no long term debt outstanding as of June 30, 1959; and that the company's first mortgage indebtedness on land, buildings and equipment at Hamilton and Canton, Ohio, which amounted to $321,444.36 as of June 30, 1955, was liquidated by June 30, 1958. Exhibits 1, 2, 3, 4, 5 and 6, Table 6.

B. That the report of Lybrand, Ross Bros. & Montgomery, dated December 19, 1960, shows:

B. 1) That while the average annual sales volume of Herring-Hall-Marvin almost doubled during the period from June 30, 1950 to June 30, 1959, the ratio to net sales of cost of sales; gross profit on sales; selling, general and administrative expenses remained relatively constant during that same period of time. Exhibit 7.

B. 2) That the company's retained earnings improved from a loss position of $385,144 in 1944 to a favorable position of $822,016 in 1950, an increase of $1,207,160; and that during the period from June 30, 1950 to June 30, 1959, the company's retained earnings increased from $822,016 to $2,247,987, an increase of $1,425,971. Exhibit 8.

B. 3) That the working capital ratio of the company during the period 1944 through 1950 averaged 1.01; and that [fol. 503] during the period June 30, 1950 through June 30, 1959, the working capital averaged 1.47, an improvement of .46 over the earlier period. That the difference between the foregoing working capital ratios, derived from the Lybrand report dated December 19, 1960, and the working capital ratios derived from the company's published financial statements (see paragraph A5 above) appears to be attributable in part to the reclassification of certain items as non-current, and also to the fact that the published statements for the fiscal years ending June 30, 1955 through June 30, 1958, represent consolidated statements while those figures for the same period, shown in the Lybrand report dated December 19, 1960, exclude subsidiary operations. Exhibit 9

B. 4) That during the period 1944-1950, the company averaged $1.86 in current liabilities to each $1 of cash and receivables; and that during the period from June 30, 1950 to June 30, 1959, this relationship improved and averaged $1.29 in current liabilities to each $1 of cash and receivables or an improvement of 57 cents. Exhibit 10

B. 5) That during the period 1944-1950, the average annual rate of inventory turnover for the company was 3.7, an approximate turnover of inventory of once every 98 days. That during the period from June 30, 1950 to June 30, 1959, the average rate of inventory turnover was 5.27 or an approximate turnover of once every 69 days. Exhibit 11

B. 6) That the computation of the company's quick ratio, as set out in the report of Lybrand, Ross Bros. & Montgomery, dated January 3, 1961, was made without regard to the company's receivables, and that a computation of the company's quick ratio on the basis of both cash and receivables (the company apparently had no government securities) shows that for its fiscal years 1957, 1958 and 1959 the quick ratios were .74, .81 and .83, respectively. Exhibit 12

B. 7) That reference to the "Quarterly Financial Report for Manufacturing Corporations, Second Quarter 1959," published by the Federal Trade Commission and the Securities Exchange Commission, and relied upon in the Lybrand report dated January 3, 1961, shows that for the [fol. 504] Second Quarter 1959 the rate of return on shareholders' equity for the industry classified in the "Quarterly Financial Report for Manufacturing Corporations" as "Other Fabricated Metal Products," was 19.6 before taxes and 9.7 after taxes; and that the rate of return on investment for Herring-Hall-Marvin for its fiscal year ending June 30, 1959 before taxes was 19.6 and 8.98 after taxes.

That it is my opinion, based upon an examination of the published financial statements of Herring-Hall-Marvin Safe Company for the fiscal years ending June 30, 1955 through June 30, 1959, that these statements do not show that the company was in a failing condition during that period nor do the yshow that during that period the company was heading toward a failing condition.

Milton Singman.

Subscribed and sworn to before me this 27 day of Feb., 1961.

Sara B. McGrann, Notary Public, D.C.

My Commission Expires May 1, 1961.

[fol. 505] EXHIBIT 6 TO AFFIDAVIT OF MILTON SINGMAN

Table 1

Fiscal Year Ending	Shareholders Equity (1)	Income Before Federal Taxes	Ratio (Percent)	Income After Federal Taxes	Ratio (Percent)
6/30/55.....	(not available)	$ 165,324.41		$116,924.41	
6/30/56.....	$1,507,870.13	574,415.61	38.09	256,415.61	17.00
6/30/57.....	1,751,763.74	407,710.81	23.27	181,710.81	10.37
6/30/58.....	1,921,073.05	407,976.52	21.24	185,776.52	9.67
6/30/59.....	2,088,666.57	409,402.73	19.6	187,602.73	8.98
	$7,269,373.49	$1,799,505.67		$811,505.67	
4-Year Average	$1,817,343.37	$ 449,876.42	24.75	$202,876.42	11.16

(1) Represents stock investment and surplus as of beginning of fiscal year.

[fol. 506]

Table 2

Fiscal Year Ending	Retained Earnings
6/30/55.....	$1,433,455.81
6/30/56.....	1,677,989.42
6/30/57.....	1,847,823.73
6/30/58.....	2,021,762.25
6/30/59.....	2,247,986.98

Table 3

Fiscal Year Ending	Dividend Declared
6/30/55.....	$11,893.00
6/30/56.....	11,882.00
6/30/57.....	11,876.50
6/30/58.....	11,838.00
6/30/59.....	11,783.50

[fol. 507]

Table 4

Fiscal Year Ending	Shareholders Equity	Number of Shares Issued and Outstanding	Book Value Per Share
6/30/55	$1,507,870.13	5,943	$253.72
6/30/56	1,751,763.74	5,939	294.96
6/30/57	1,921,073.05	5,936	323.63
6/30/58	2,088,666.57	5,898	354.13
6/30/59	2,313,441.30	5,890	392.77

Table 5

Fiscal Year Ending	Current Assets	Current Liabilities	Working Capital	Ratio
6/30/55	$3,061,768.96	$2,235,898.70	$ 825,870.26	$1.37
6/30/56	3,621,108.09	2,645,051.25	976,056.84	1.37
6/30/57	4,105,824.24	3,022,629.44	1,083,194.80	1.36
6/30/58	3,501,379.01	2,233,060.46	1,268,318.55	1.57
6/30/59	3,426,473.19	1,930,742.07	1,495,731.12	1.77

[fol. 508]

Table 6

The firm's working capital for its fiscal year ending June 30, 1959, increased to the extent of $227,412.57 over the prior year. The changes in the current assets and current liabilities which account for this increase in working capital are shown below:

					Effect on Working Capital	
Current Assets:	6/30/58	6/30/59	Increase	Decrease	Increase	Decrease
Cash	$ 231,653.96	$ 142,521.63		$ 89,132.33		$ 89,132.33
Notes & Accounts Receivable	1,587,383.30	1,464,564.70		122,818.60		122,818.60
Inventories	1,496,688.98	1,600.152,86	$103,463.88		$103,463.88	
Prepaid Expense	41,078.34	41,258.30	179.96		179.96	
Cash Surrender Value of Life Insurance	144,574.43	177,975.70	33,401.27		33,401.27	
Total Current Assets	3,501,379.01	3,426,473.19				
Current Liabilities:						
Notes Payable	635,259.12	297,865.07		$337,394.05	$337,394.05	
Loan Payable	72,975.00			72,975.00	72,975.00	
Accounts Payable	578,478.44	696,071.81	$117,593.37			$117,593.37
Dividends Payable	2,949.00			2,949.00	2,949.00	
Accrued Expenses	620,568.20	713,303.45	92,735.25			92,735.25
Provision for Federal Income Taxes	214,038.20	223,501.74	9,463.54			9,463.54
Provisions for Erection Costs on Contracts Billed	73,792.50			73,792.50	73,792.50	
First Mortgage on land, Buildings and Equipment at Hamilton, Ohio	35,000.00			35,000.00	35,000.00	
Total Current Liabilities	$2,233,060.46	$1,930,742.07				
Working Capital Increase	$1,268,318.55	$1,495,731.12			$659,155.66	$431,743.09
						227,412.57
					$659,155.66	$659,155.66

Herring-Hall-Marvin Safe Co.

Comparative Profit and Loss Statements (1944–1950) as against (1951–1959)

Source: Summary Statements of Income furnished by Lybrand, Ross Bros. and Montgomery

Submitted 12-19-60.

Year	Net Sales	Cost of Sales	Gross Profit on Sales	Selling, Gen'l. and Adm. Exp.	Net Operating Profit	Other Income	Total	Other Expense	Income or (Loss) Before FIT	Provision for FIT	Refundable FIT (Prior Year)	Net Income or (Loss) After FIT
1944	$ 1,157,967	$ 953,468	$ 204,499	$ 144,913	$ 59,586	$ 144,820	$ 204,406	$ 55,255	$ 149,151	$ 58,713		$ 90,438
Ratios to sales		82.3	17.7	12.5	5.1				12.9			7.8
1945	2,434,331	1,957,059	477,272	348,562	128,710	51,566	180,276	66,034	114,242	52,556		61,686
Ratios to sales		80.4	19.6	14.3	5.3				4.7			2.5
1946	4,340,353	3,103,153	1,237,200	645,903	591,297	5,288	596,585	53,534	543,051	211,000		332,051
Ratios to sales		71.5	28.5	14.9	13.6				12.5			7.7
1947	5,780,882	4,117,518	1,663,364	969,048	694,316	1,324	695,640	66,184	629,456	300,202		329,254
Ratios to sales		71.2	28.8	16.8	12.0				10.9			5.7
1948	5,881,498	4,288,351	1,593,147	1,118,295	474,852	37,297	512,149	77,583	434,566	127,612		306,954
Ratios to sales		72.9	27.1	19.0	8.1				7.4			5.2
1949	5,023,270	3,989,059	1,034,211	1,009,738	24,473	6,901	31,374	44,235	(12,861)		($8,311)	(4,550)
Ratios to sales		79.4	20.6	20.1	.5				Loss			Loss
1950	2,583,111	1,997,024	586,087	521,312	64,775	5,676	70,451	20,052	50,399	16,000		34,399
Ratios to sales		77.3	22.7	20.2	2.5				2.0		—	1.3
Totals	$27,201,412	$20,405,632	$ 6,795,780	$ 4,757,771	$2,038,009	$ 252,872	$2,290,881	$ 382,877	$1,908,004	$ 766,083	($8,311)	$1,150,232
(1) Annual average (6½ yrs.)	$ 4,184,833	$ 3,139,328	$ 1,045,505	$ 731,965	$ 313,540	$ 38,903	$ 352,443	$ 58,904	$ 293,539	$ 117,859	($1,279)	$ 176,959
Annual average ratios		75.0	25.0	17.5	7.5				7.0			4.2
1951	$ 6,433,260	$ 4,977,748	$ 1,455,512	$ 939,285	$ 516,227	$ 15,219	$ 531,446	$ 74,958	$ 456,488	$ 252,434		$ 204,054
Ratios to sales		77.4	22.6	14.6	8.0				7.1			3.2
1952	6,700,629	4,991,805	1,708,824	1,244,484	464,340	17,122	481,462	23,384	458,078	275,162		182,916
Ratios to sales		74.5	25.5	18.6	7.0				6.8			2.7
1953	6,443,856	4,951,422	1,492,434	1,272,189	220,245	13,746	233,991	46,721	187,270	42,076	($22,082)	167,276
Ratios to sales		76.8	23.2	19.7	3.4				2.9			2.6
1954	6,898,633	5,175,650	1,722,983	1,430,877	292,106	6,808	298,914	38,124	260,790	51,000		209,790
Ratios to sales		75.0	25.0	20.7	4.2				3.8			3.0
1955	7,207,862	5,459,256	1,748,606	1,566,831	181,775	3,946	185,721	30,323	155,398	48,400		106,998
Ratios to sales		76.0	24.0	21.7	2.5				2.2			1.5
1956	9,234,984	6,991,007	2,243,977	1,634,193	609,784	21,283	631,067	39,304	591,763	318,000		273,763
Ratios to sales		75.7	24.3	17.7	6.6				6.4			3.0
1957	10,672,279	8,380,904	2,291,375	1,880,063	411,312	40,936	452,248	43,799	408,449	226,000		182,449
Ratios to sales		78.6	21.5	17.6	3.9				3.8			1.7
1958	10,301,560	7,894,225	2,407,335	1,995,603	411,732	42,641	454,373	43,359	411,014	222,200		188,814
Ratios to sales		76.6	23.4	19.4	4.0				4.0			1.8
1959	10,023,199	7,608,213	2,414,986	2,023,150	391,836	42,037	433,873	24,470	409,403	221,800		187,603
Ratios to sales		75.9	24.1	20.2	3.9				4.0			1.9
Totals	$73,916,262	$56,430,230	$17,486,032	$13,986,675	$3,499,357	$ 203,738	$3,703,095	$ 364,442	$3,338,653	$1,657,072	($22,082	$1,703,663
Annual average (9 yrs.)	$ 8,212,918	$ 6,270,026	$ 1,942,892	$ 1,554,075	$ 388,817	$ 22,638	$ 411,455	$ 40,494	$ 370,961	$ 184,119	($2,454)	$ 189,296
Annual average ratios		76.3	23.7	18.9	4.7				4.5			2.3

(1) Annual averages 1944–1950 computed by dividing totals by 6½ years as 1950 appears to be a split year when company changed from Calendar Year to Fiscal Year basis.

[fol. 510] EXHIBIT 8 TO AFFIDAVIT OF MILTON SINGMAN

Herring-Hall-Marvin Safe Co.

Comparative Summary of Retained Earnings for period 1944–1950 with period 1951–1959

Year	Retained Earnings Beginning of Period	Retained Earnings End of Period	Increase	Decrease	Average Annual Percent of Increase
1944	(3) $385,144	$ 294,706 (3)	$ 90,438		
1945	(3) 294,706	233,020 (3)	61,686		
1946	(3) 233,020	145,531	378,551		
1947	145,531	474,785	329,254		
1948	474,785	780,659	305,874		
1949	780,659	787,617	6,958		
1950	787,617	822,016	34,399		
	$ 1,275,722	$ 2,482,882	$1,207,160		94.6
Annual average (6½ yrs.)	$ 196,265	$ 381,982	$ 185,717		
1951	$ 822,016	$ 1,045,262	$ 223,246		
1952	1,045,262	1,215,783	170,521		
1953	1,215,783	1,370,788	155,005		
1954	1,370,788	1,254,616		$116,172 (1)	
1955	1,254,616	1,450,168	195,552 (2)		
1956	1,450,168	1,712,049	261,881		
1957	1,712,049	1,882,662	170,573		
1958	1,882,622	2,059,598	176,976		
1959	2,059,598	2,247,987	188,389		
			$1,542,143	$116,172	
			116,172		
	$12,812,902	$14,238,873	$1,425,971		90.0
Annual average (9 yrs.)	1,423,656	1,582,097	$ 158,441		

Source: Summary of Statements of Retained Earnings for period 1944 thru 1959 furnished by Lybrand, Ross Bros. and Montgomery in their report dated 12–19–60.

Company changed from a calendar year to a fiscal year closing in 1950.

(1) Results from provision to reduce investments in and advances to subsidiaries to estimated realizable value, ($314,000).

(2) Includes profit of $49,213 on sale of Quickdraft Division. Also loss of $10,406 on liquidation of subsidiaries.

Also includes $61,640 adjustment of property, plant and equipt., and related depreciation allowance to conform to IRS report less applicable FI taxes.

(3) Red figures.

[fol. 511] EXHIBIT 9 TO AFFIDAVIT OF MILTON SINGMAN

Herring-Hall-Marvin Safe Co.

Comparison of Working Capital position for period 1944–1950 with period 1951–1959

Year	Current Assets	Current Liabilities	Net Working Capital	Ratio
1944	$ 1,500,211	$ 1,667,516	$ 167,305 (2)	1 11 (2)
1945	1,212,642	1,452,528	239,886 (2)	1 20 (2)
1946	1,922,494	2,092,540	170,046 (2)	1 09 (2)
1947	1,896,996	1,933,258	36,262 (2)	
1948	2,028,177	1,769,891	258,286	1 15
1949	1,689,366	1,471,828	217,538	1 15
1950 (1)	1,781,018	1,487,943	293,075	1 20
Totals	$12,030,904	$11,875,504	$ 155,400	
Annual average (6½ yrs.)	$ 1,850,908	$ 1,827,001	$ 23,907	1 01
1951	$ 2,049,471	$ 1,202,798	$ 846,673	1 70
1952	2,004,294	1,177,720	826,574	1 70
1953	2,033,421	1,368,399	665,022	1 49
1954	2,196,834	1,649,691	547,143	1 33
1955	2,571,453	1,916,827	654,626	1 34
1956	2,848,253	2,054,419	793,834	1 39
1957	3,361,701	2,489,411	872,290	1 35
1958	3,107,459	2,108,981	998,478	1 47
1959	3,248,497	1,930,742	1,317,755	1 68
Totals	$23,321,383	$15,898,988	$7,522,395	
Annual average (9 yrs.)	$ 2,591,265	$ 1,766,554	$ 835,822	1 47

Source: Summary of Statements of Assets and Liabilities for periods 12/31/44 thru 6/30/[illegible] furnished by Lybrand, Ross Bros. and Montgomery in their report dated 12-19-60.

(1) Company changed from a calendar year to a fiscal year closing.
(2) Red figures.

[fol. 512] EXHIBIT 10 TO AFFIDAVIT OF MILTON SINGMAN

Herring-Hall-Marvin Safe Company

Liquidity Ratios (Cash, Receivables and Temporary Investments) to Current Liabilities

Year	Cash and Receivables	Current Liabilities	Ratio per Year	Average Ratio
1944	$ 1,171,655	$ 1,667,516	1.42	
1945	612,185	1,452,528	2.37	
1946	1,079,607	2,092,540	1.94	
1947	896,176	1,933,258	2.16	
1948	948,517	1,769,891	1.87	
1949	759,323	1,471,828	1.94	
1950	923,323	1,487,943	1.61	
Total	$ 6,390,786	$11,875,504		
Average (6½ yrs.)	983,198	1,827,001		1.86
1951	$ 1,110,833	$ 1,202,798	1.08	
1952	844,112	1,177,720	1.4	
1953	1,056,553	1,368,399	1.3	
1954	1,100,409	1,649,691	1.5	
1955	1,377,815	1,916,827	1.39	
1956	1,690,921	2,054,419	1.21	
1957	1,850,450	2,489,411	1.35	
1958	1,698,657	2,108,981	1.24	
1959	1,607,086	1,930,742	1.2	
Total	$12,836,336	$15,898,988		
Average (9 yrs.)	$ 1,370,760	$ 1,766,554		1.29

Note: At no time during the above period do the cash and receivables equal the company's current liabilities. The ratios set forth show an adverse position in that they reflect a ratio of current liabilities to cash and receivables.

Source: Summary Schedules of Assets, Liabilities, Shareholders' Equity and Operations for periods ending 12/31/44 through 6/30/59.

[fol. 513] EXHIBIT 11 TO AFFIDAVIT OF MILTON SINGMAN

Herring-Hall-Marvin Safe Company

Inventory Turnover for period 1944–1950 compared to period 1951–1959

Year	Cost of Sales	Inventory	Rate of Turnover per Year	Average Rate of Turnover
1944	$ 953,468	$ 315,738	3.02	
1945	1,957,059	582,828	3.36	
1946	3,103,153	829,522	3.74	
1947	4,117,518	981,759	4.19	
1948	4,288,351	1,053,037	4.07	
1949	3,989,059	898,213	4.44	
(1) 1950	1,997,024	825,859	2.42	
Total	$20,405,632	$ 5,486,956		
Average (6½ yrs.)	3,139,328	844,147		3.7 (98 days)
1951	$ 4,977,748	$ 919,457	5.41	
1952	4,991,805	1,103,615	4.52	
1953	4,951,422	919,595	5.38	
1954	5,175,650	1,049,211	4.93	
1955	5,459,256	1,141,498	4.78	
1956	6,991,007	1,124,995	6.21	
1957	8,380,904	1,470,342	5.7	
1958	7,894,225	1,371,749	5.75	
1959	7,608,213	1,600,153	4.75	
Total	$56,430,230	$10,700,615		
Average (9 yrs.)	$ 6,270,026	$ 1,188,957		5.27 (69 days)

(1) Company changed from calendar year to fiscal year closing.
Inventory figures are net after deductions for advance payments on contracts.

Source: Summary Schedules of Assets, Liabilities, Shareholders' Equity and Operations for periods ending 12/31/44 through 6-30-59.

[fol. 514]

EXHIBIT 12 TO AFFIDAVIT OF MILTON SINGMAN

Herring-Hall-Marvin Safe Company

Comparison of Company Statistical Data with that of Industry as of June 30, 1951 through 1959

	June 30								
	1951	1952	1953	1954	1955	1956	1957	1958	1959
Herring-Hall-Marvin Safe Company:									
(c) Quick Assets (including Receivables)	$1,110,833	$ 844,112	$1,056,553	$1,100,409	$1,377,815	$1,690,921	$1,850,450	$1,698,657	$1,607,086
(c) Current Liabilities	1,202,798	1,177,720	1,368,399	1,649,691	1,916,827	2,054,419	2,489,411	2,108,981	1,930,742
Quick Ratio (a)	.92	.72	.77	.67	.72	.82	.74	.81	.83
Industry:									
Quick Ratio (b)	1.35	1.25	1.17	1.27	1.25	1.13	1.15	1.30	1.13

(a) Quick Ratio was determined by dividing the amount of current liabilities into the amount of quick assets. Quick assets for the purpose of determining the above statistical information includes cash and receivables (Accounts and Notes Receivable—net).

(b) Represents ratio computed from figures contained in "Quarterly Financial Report" for U.S. Manufacturing Corporations of Federal Trade Commission-Securities Exchange Commission as follows:

(1) For the years 1951–1957 inclusive, from information classified "Fabricated Metal Products."
For the years 1958–1959 inclusive, from information classified "Other Fabricated Metal Products."
Period used was calendar quarter ending June 30.

(c) These figures obtained from report of Lybrand, Ross Bros. and Montgomery, dated 12/19/60.

[fol. 515]

Period (2nd Qtr.) June 30	Industry (millions of $) Quick Assets (Cash and Gov't. securities only) (1)	Current Liabilities (2)	Quick Ratio (2) divided into (1)		Industry (millions of $) Quick Assets (Cash, Gov't. securities and Receivables) (1)	Current Liabilities (2)	Quick Ratio (2) divided into (1)	
1951	$1,123	$1,584	.71	Ratios agree with those shown in Lybrand report of 1-3-61.	$2,139	$1,584	1.35	Ratios computed same basis as Lybrand report except that receivables were included as part of Quick Assets, Receivables were obtained from "Quarterly Financial Report for Manufacturing Corporations" of Federal Trade Commission-Securities Exchange Commission. Cash, Gov't. Securities and Current Liabilities also obtained from same source. Period used was calendar quarter ending 6/30. (Same as Lybrand.)
1952	1,183	1,909	.62		2,378	1,909	1.25	
1953	1,080	2,110	.51		2,463	2,110	1.17	
1954	993	1,841	.54		2,336	1,841	1.27	
1955	1,023	2,002	.51		2,500	2,002	1.25	
1956	939	2,334	.40		2,640	2,334	1.13	
1957	983	2,604	.38		2,983	2,604	1.15	
1958	1,018	2,214	.46		2,888	2,214	1.30	
1959	1,009	2,756	.37		3,102	2,756	1.13	

	Herring-Hall-Marvin (1)	(2)	(2) divided into (1)	
1951	$1,110,833	$1,202,798	92.35	Columns (1) and (2) from Lybrand report, dtd. 12/19/60.
1952	844,112	1,177,720	71.67	
1953	1,056,553	1,368,399	77.21	
1954	1,100,409	1,649,691	66.70	
1955	1,377,815	1,916,827	71.88	
1956	1,690,921	2,054,419	82.31	
1957	1,850,450	2,489,411	74.33	
1958	1,698,657	2,108,981	80.54	
1959	1,607,088	1,930,742	83.24	

[fol. 516] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES H. BOYCE—Filed March 1, 1961

CITY OF WASHINGTON,
District of Columbia, ss:

JAMES H. BOYCE, being duly sworn, deposes and says:

1. I am President of Boyce Machinery Corporation, Baton Rouge, Louisiana, which is engaged in the sales and service of heavy construction machinery in Louisiana. My other business interests and positions are varied. Amongst these I am an officer and director in Lotram, Inc. (an electronics manufacturing company), Mid-City Motors, Inc. (a Ford dealership), Southern Fleet Leasing Corporation (an automobile leasing company), and City National Bank. I have no connection with the bank vault or safe business.

2. In or about 1958, I became interested in the manufacture and sale of a burglar alarm device.

3. An examination of my records indicates that my first contact with Herring-Hall-Marvin Safe Company was some time in the middle of 1958.

4. My records further indicate that by August 25, 1958, negotiations had progressed to the point where I went to Hamilton, Ohio, to meet with Mr. Mosman and looked over his facilities.

[fol. 517] 5. Negotiations proceeded until we learned that Mr. Mosman had sold the company to Diebold.

6. We were in serious negotiations with Mr. Mosman and while a definite offer was never made, a considerable amount of time was devoted to trying to secure a price from Mr. Mosman and also how much of a purchase price he would be willing to carry in the form of a leaseback, mortgage note, or any other method. Mr. Mosman was naturally interested in the largest possible sales price for cash while we would naturally be interested in the smallest cash payment possible and the most favorable terms on the balance. Hayden-Stone's position in the matter was that of a bank.

7. I wish to state that my company was definitely interested in acquiring the Herring-Hall-Marvin Safe Company

and had devoted considerable time and money towards this end.

8. My recollection is that Mr. Mosman had indicated a price of $3,400,000 for all assets less cash value of life insurance. This price would naturally be after removing any liabilities on these assets as indicated by the office memorandum made a part hereof.

9. A leaseback of land and buildings for 20 years at $67,500 per year had also been discussed as a reduction to the $3,400,000 figure.

10. The key factor in the negotiations as far as we were concerned was the total price rather than the terms.

[fol. 518] 11. To provide alternatives relative to financing, I had gone to bankers, in Chicago, as well as to Hayden-Stone in New York.

12. Attached hereto as exhibits are my office memoranda of my discussions and various projections based upon them.

13. During the negotiations, I met with Mr. Carter Hammond, of Herring-Hall-Marvin Safe Company in Washington, in addition to my meetings with Mr. Mosman.

14. I have been shown a photostatic reproduction of an original letter from the office of my attorney, John W. Cross, addressed to Mr. Mosman under date of April 13, 1959. Certain figures are typed in on that letter by others below the signature. Those figures are a substantially accurate reflection of the negotiations to that point. In fact I was at that time actively engaged in considering various methods of financing on substantially that basis.

James H. Boyce.

Subscribed and sworn to before me this 22nd day of February, 1961.

Marguerite E. O'Brien, Notary Public, D.C.

My Commission Expires April 14th, 1961.

[fol. 519] ATTACHMENTS TO AFFIDAVIT OF JAMES H. BOYCE

November 26, 1958

Mr. David B. MacNeil,
Brookside, New Jersey.

DEAR MR. MACNEIL:

Please find enclosed the draft of memorandum which is merely to serve as a basis for further consideration.

If the memorandum is presented to Mr. Coakley, please specifically point out that I have distinctly emphasized the Boyce interest as a matter of psychology.

With respect to the fee stated, it is my understanding that the fee in the amount of $130,000 is recognized as an appropriate amount. However, as I indicated in our discussion yesterday, I thought it much more desirable to put the completely round figure of $100,000 in the memorandum and particularly in view of its relation to the 5 times earnings figure. In view of past discussions it would seem that the other $30,000 would be supplied from the company or in stock.

I assume we will be in touch on Monday.

Sincerely, John W. Cross.

encl.
cc: James H. Boyce

[fol. 520] November 26, 1958.

Memorandum to: Warren Mosman
Re: Herring-Hall-Marvin Safe Company.

Introduction

The purpose of recent negotiations has been to arrange for the strengthening and transfer of the company along the lines contemplated by Mr. Mosman. We believe we may have been successful in arranging a most profitable sale on a basis which will permit Mr. Mosman to retain connection with the company while he effects a gradual withdrawal during which time new strength will be added to the company without undue disruption to present personnel or business operations.

It should be distinctly understood the following in no way constitutes an offer, but rather a basis for discussion. It should also be understood that while a program of this character may be feasible, various conditions must be met. Among such conditions are the following:

(1) The program and terms herein suggested must be acceptable to Mr. Mosman, and

(2) All items, such as past profits, value of equipment, etc., are subject to verification, and

(3) The purchaser must have an opportunity and sufficient time for necessary verifications and to supply a firm proposal, and

(4) All plans or methods may be subject to change in order to effect tax advantages.

The Price

This matter has received thorough consideration by the firm of Hayden, Stone & Co. of New York City. This firm has had wide experience with transactions of this character and it is familiar with appropriate formulae and prevailing business practices governing such transactions.

It is a well accepted rule that the top price for sales or mergers of companies is based upon five times the average gross profits. Based on the books of Herring-Hall-Marvin this would result in a computation of 5 times $400,000 or a sales price of approximately $2,000,000. However, subject [fol. 521] to investigation, it is believed that in the bands of a new organization certain items formerly stated as salaries or other expenses, plus certain obvious economies should result in an annual profit in an amount approximating $680,000. This would result in a purchase price of $3,400,000. With this background and in order to avoid any "bargaining" over price this memorandum is premised upon the outside price of $3,500,000. It should be stated, however, that certain expenses, not in excess of $100,000 may be assessible against this sales price in which event the *net* sales price would still result in a figure which is five times projected earnings.

The Purchaser

The firm of Hayden, Stone & Co. will play an important role in the formation of the purchasing group. Ultimately,

there will be included in the operating company two of the James H. Boyce companies and the Boyce interests will represent a principal interest in the purchasing group. The purchasing group will also include as a principal interest Mr. John A. Coakley, Jr. of the "Automatic" Sprinkler Corporation of America, Youngstown, Ohio.

It is contemplated that within a reasonably short period there will be a public offering of a portion of the stock representing the properties of the purchasing group. At present it is contemplated that the amount of stock offered for sale shall not be sufficient to constitute control. Because of the prospect of stock offering it is believed there should be constituted a strong Board of Directors. The Directors will include, Mr. Warren Mosman, Mr. James H. Boyce, Mr. John W. Cross, a representative of Hayden, Stone and a representative of the "Automatic" Sprinkler Corporation of America. It is also contemplated that there will be a smaller group functioning as an Executive Committee in which event the individuals or firm representatives above named shall be included on the Executive Committee.

Now Management

It is proposed that Mr. Mosman shall remain with the company on a reasonable and mutually acceptable basis for a period of not less than three years. If Mr. Mosman desires, this may be on a part time basis. It is also proposed that reasonable protection will be afforded to present company personnel with principal emphasis on key personnel and that such key personnel shall be afforded an opportunity for limited financial participation in the purchasing group.

[fol. 522] Payment Method

Bearing in mind what is believed to be Mr. Mosman's desires for payment, the following method seems to best fit all considerations:

(a) It is understood that for family and perhaps tax reasons, Mr. Mosman desires that a long term lease on the buildings be effected. Therefore, a lease representing $1,250,000 for a period of not less than 10 or more than 15 years is recommended. The lease

may contain provisions permitting the purchasers to acquire title upon termination.

(b) Whether the purchasing group shall acquire the equipment and other assets of Herring-Hall-Marvin or the capital stock of the company is subject to future determination based on tax results.

(c) A cash payment in the amount of $1,500,000 shall be paid by the purchasers upon closing of the transactions.

(d) There shall be deferred for payment an amount which is equal to one-half of the cash payment. This amount is $750,000 and shall be payable monthly at the rate of $20,000 per month for a period of 37 months next following closing of the transaction, plus a payment of $10,000 in the 38th month. This indebtedness shall be evidenced by a company obligation.

It should be noted that the lease payments and monthly payment due Mr. Mosman would be the only obligations of the company, other than present operating liabilities. The total of $3,500,000 would be arranged as follows:

$1,500,000—cash payment
1,250,000—lease payments
750,000—monthly payments

$3,500,000

[fol. 523] Facts Assumed in the Following Presentation

We have been advised that with certain changes in the method of operation that the before-tax operating profit can be increased to $650,000 per year. This figure has been used in the presentation.

For the past several years the corporation has had approximately $160,000 per year depreciation which gives us cause to believe that a five-year depreciation schedule on the machinery acquired by this acquisition would be in line. We have used seven years in this presentation. Since we have proposed to acquire the receivables at a discount, we feel that the seven year figure would more nearly show the true cash flow. There might be some deviation during

the first year but it would be reasonable to expect that most of the discounted receivables would be collected.

We propose to acquire existing inventory on the basis of 40% of book value.

With the high recapitalization of the fixed assets, it would be desirable to increase the long term debt and keep the current bank borrowing to a minimum; however, this is not shown in the presentation.

[fol. 524]

Herrin-Hall-Marvin Safe Co., Inc.

Hamilton, Ohio

Pro-Forma Balance Sheet

Acquisition Date and Ten Years Later

Assets		On Acquisition Date	Ten Years Later
Cash		$ 231,653 86	$2,352,711 86
Notes and accounts receivable	$1,271,861 20		
LESS: Provision for doubtful accounts	25,000 00	1,246,861 20	1,587,383 30
Inventories—(LIFO)		598,675 56	598,675 56
Prepaid expenses		41,078 34	41,078 34
Cash surrender value of life insurance		144,574 43	144,574 43
Total Current Assets		$2,262,843 49	$4,723,423 49
Investments		6,081 00	6,081 00
Fixed Assets		2,500 000,00	None
Patents		1 00	1 00
Total Assets		$4,768,925 49	$4,729,505 49
Liabilities and Capital			
Notes payable, unsecured		635,259 12	635,259 12
Loans payable to foreign bank		72,975 00	72,975 00
Accounts payable		578,478 44	578,478 44
Dividends payable		2,949 00	2,949 00
Accrued expenses, including Federal income tax		834,606 40	834,606 40
Provision for erection costs on contracts billed		73,792 50	73,792 50
First mortgage on certain Hamilton, Ohio property		35,000 00	35,000 00
Total Current Liabilities		$2,233,060 46	$2,233,060 46
Notes payable other than current		35,865 03	35,865 03
Mortgage on fixed assets		2,000,000 00	None
Capital stock		500,000 00	500,000 00
Earned surplus			1,960,580 00
Total Liabilities and capital		$4,768,925 49	$4,729,505 49

[fols. 525–526]

Herrin-Hall-Marvin Safe Co., Inc., Hamilton, Ohio

Ten Year Projection of Earnings and Cash Position

	1	2	3	4	5	6	7	8	9	10
Annual profit before lease payments, mortgage interest and depreciation	$ 810,000.00	$ 810,000.00	$810,000.00	$810,000.00	$810,000.00	$810,000.00	$810,000.00	$810,000.00	$810,000.00	$810,000.00
Less:										
Lease payments	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00
Mortgage interest @5%	96,420.00	88,320.00	79,800.00	70,880.00	61,440.00	51,580.00	41,200.00	30,260.00	18,800.00	6,720.00
Depreciation	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.90			
	553,562.85	545,462.85	536,942.85	528,022.85	518,582.85	508,722.85	498,342.90	130,260.00	118,800.00	106,720.00
Taxable profit	256,437.15	264,537.15	273,057.15	281,977.15	291,417.15	301,277.15	311,657.10	679,740.00	691,200.00	703,280.00
Income taxes	130,000.00	135,000.00	140,000.00	145,000.00	150,000.00	155,000.00	160,000.00	355,000.00	360,000.00	365,000.00
Profit after provision for taxes	126,437.15	129,537.15	133,057.15	136,977.15	141,417.15	146,277.15	151,657.10	324,740.00	331,200.00	338,280.00
Add:										
Depreciation	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.80			
Cash available for mortgage principal	483,580.00	486,680.00	490,200.00	494,120.00	498,560.00	503,420.00	508,800.00	324,740.00	331,200.00	338,280.00
Cash required for mortgage principal	158,220.00	166,320.00	174,840.00	183,760.00	193,200.00	203,060.00	213,440.00	224,380.00	235,840.00	246,940.00
Cash surplus:										
This Year	326,360.00	320,360.00	315,360.00	310,360.00	305,360.00	300,360.00	295,360.00	100,360.00	95,360.00	91,340.00
To Date	$326,360.00	$646,720.00	$962,080.00	$1,272,440.00	$1,577,800.00	$1,878,160.00	$2,173,520.00	$2,273,880.00	$2,369,240.00	$2,460,580.00
					(x)					

(x) Mortgage can be liquidated.

[fols. 527–528]

Herrin-Hall-Marvin Safe Co., Inc., Hamilton, Ohio

Ten Year Projection of Earnings and Cash Position

	1	2	3	4	5	6	7	8	9	10
Annual Profit before lease payments, and mortgage interest and depreciation	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00
Less:										
Lease payments	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00
Mortgage interest	48,960.00	46,620.00	44,130.00	41,540.00	38,800.00	35,940.00	32,920.00	29,750.00	26,410.00	22,910.00
Depreciation	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.90			
	$506,102.85	$503,762.85	$501,272.85	$498,682.85	$495,942.85	$493,082.85	$490,062.90	$129,750.00	$126,410.00	$122,910.00
Taxable profit	53,897.15	56,237.15	58,727.15	61,317.15	64,057.15	66,917.15	69,937.10	430,250.00	433,590.00	437,090.00
Income taxes	24,500.00	25,700.00	26,500.00	28,000.00	29,800.00	30,700.00	32,800.00	225,000.00	226,500.00	228,000.00
Profit after provision for income taxes	29,397.15	30,537.15	32,227.15	33,317.15	34,257.15	36,217.15	37,137.10	205,250.00	207,090.00	209,090.00
Add:										
Depreciation	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.90			
Cash available for mortgage principal	386,540.00	387,680.00	389,370.00	390,460.00	391,400.00	393,360.00	394,280.00	205,250.00	207,090.00	209,090.00
Cash required for mortgage principal	45,960.00	48,300.00	50,790.00	53,380.00	56,120.00	58,980.00	62,000.00	65,170.00	68,510.00	72,010.00
Cash surplus to mortgage requirements:										
This year	340,580.00	339,380.00	338,580.00	337,080.00	335,280.00	334,380.00	332,280.00	140,080.00	138,580.00	137,080.00
To Date	$340,580.00	$679,960.00	$1,018,540.00	$1,355,620.00	$1,690,900.00	$2,025,280.00	$2,357,560.00	$2,497,640.00	$2,636,220.00	$2,773,300.00

* Second $1,000,000 note can be liquidated at the end of third year.

[fols. 529-530]

	1	2	3	4	5	6	7	8	9	10
Annual profit before lease payments, mortgage interest, and depreciation	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00	$560,000.00
Less:										
Lease payments	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00	100,000.00
Mortgage interest	73,440.00	69,930.00	66,195.00	62,310.00	58,200.00	53,910.00	49,380.00	44,625.00	39,615.00	34,365.00
Depreciation	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.90			
	530,582.85	527,072.85	523,337.85	519,452.85	515,342.85	511,052.85	506,522.90	144,625.00	139,615.00	134,365.00
Taxable profit	29,417.15	32,927.15	36,662.15	40,547.15	44,657.15	48,947.15	53,477.10	415,575.00	420,385.00	425,635.00
Income taxes	10,000.00	12,000.00	14,000.00	16,000.00	18,000.00	21,000.00	23,500.00	215,000.00	218,000.00	220,000.00
Profit after provision for income taxes	19,417.15	20,927.15	22,662.15	24,547.15	26,657.15	27,947.15	29,977.10	200,375.00	202,385.00	205,635.00
Add:										
Depreciation	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.85	357,142.90			
Cash available for mortgage principal	376,560.00	378,070.00	379,805.00	381,690.00	383,800.00	385,090.00	387,120.00	200,375.00	202,385.00	205,635.00
Cash required for mortgage principal	68,940.00	72,450.00	76,185.00	80,070.00	84,180.00	88,470.00	93,000.00	97,755.00	102,765.00	108,015.00
Cash surplus:										
This year	307,620.00	305,620.00	303,620.00	301,620.00	299,620.00	296,620.00	294,120.00	102,620.00	99,620.00	96,720.00
To Date	$307,620.00	$613,240.00	$916,860.00	$1,218,480.00	$1,518,100.00	$1,814,720.00	$2,108,840.00	$2,211,460.00	$2,311,080.00	$2,407,800.00

[fol. 531] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF WALTER T. NOLTE—Filed March 1, 1961

CITY OF WASHINGTON,
District of Columbia, ss:

WALTER T. NOLTE, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiff.

1. I made telephone calls on February 1, 10 and 20, 1961, to Orlo A. Ewing, Executive Vice President of Lovell Manufacturing Company of Erie, Pennsylvania. who signed the letters of April 2 and 15, 1959, from Lovell to HHM which are attached to the affidavit response of Warren Mosman to plaintiff's interrogatories relative to possible purchasers other than Diebold. The interrogatories were filed herein January 9, 1961, and the response on January 20, 1961.

2. Mr. Ewing advised me he has papers in his files in addition to copies of the letters attached to the Mosman response, including a letter from Lovell to HHM subsequent to April 15, 1959, but he refused to produce such papers.

Walter T. Nolte.

Subscribed and sworn to before me this 27 day of February, 1961.

Sara B. McGrann.

My Commission Expires May 1, 1961.

[fol. 532] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF JOHN M. TOOHEY—Filed March 1, 1961

JOHN M. TOOHEY, being duly sworn, deposes and says:

I am one of the attorneys for plaintiff in the above-entitled action.

Attached hereto are: 1) A photostatic copy of Annual Report for 1959 published by Diebold, Incorporated, pages 1 through 10;

2) A photostatic copy of Report to the shareholders of Diebold, Incorporated, for the 9 months ended September 30, 1960, in its entirety; and

3) Option Agreement, to which is attached Agreement of Purchase and Sale, Exhibit 1 (balance sheet of April 30, 1959), Amendment to Agreement of Purchase and Sale, Employment Contract, and Amendment to Employment Contract.

John M. Toohey.

Subscribed and sworn to before me this 27 day of February 1961.

Sara B. McGrann, Notary Public.

My Commission Expires May 1, 1961.

[fol. 533] ATTACHMENT TO AFFIDAVIT—ANNUAL REPORT FOR 1959 OF DIEBOLD, INCORPORATED

[fol. 534] OFFICERS AND DIRECTORS

Board of Directors

John R. Barry, New York, President, Corroon & Reynolds Group—(Insurance).

George H. Bockius, Canton, Chairman of Executive Committee, Diebold, Incorporated.

William H. Bowen, Dallas, Investments.

James H. Clark, Dallas, Investments.

Robert Critchfield, Wooster, Director, Akron Brass Mfg. Co., Inc., Rubbermaid Incorporated.

Raymond Koontz, Canton, President, Diebold, Incorporated.

Gustave L. Levy, New York, Goldman, Sachs and Company.

Daniel Maggin, New York, Chairman of the Board, Diebold, Incorporated.

J. Brenner Root, Canton, Chairman of the Board, The Harter Bank & Trust Company.

Ralph J. Wann, Canon City, Colorado, Director, Denver & Rio Grande Western Railroad.

Executive Officers

Daniel Maggin, Chairman of the Board of Directors.
Raymond Koontz, President.
George H. Bockius, Chairman of Executive Committee.
A. W. Jackson, Vice President.
W. K. Wilson, Vice President.
E. W. Nelson, Vice President.
F. D. Robinson, Vice President and Treasurer.
C. C. Heilman, Vice President.
W. F. Mosman, Vice President.
D. A. Crawford, Secretary.

[fol. 535]

Financial Highlights

	1959 (Note A)	1958 (Note A)
Net income (after taxes)	$1,779,357	$1,567,096
Cash dividends paid—Common	384,948	368,468
Dividends paid in common stock	(Note C)	313,970
Expenditures for capital equipment	515,379	986,067
Depreciation and amortization	389,397	327,635
Net working capital (end of year)	8,376,070	6,525,111
Shares of common stock outstanding (end of year)	643,296	637,997
Earnings per common share (Note B)	2 77	2 44
Book value per common share (Note B)	14 67	12 42

Note A—The 1958 and 1959 figures are for Diebold, Incorporated and subsidiaries.

Note B—Adjusted to the basis of the 643,296 common shares outstanding at December 31, 1959.

Note C—A 5% stock dividend was declared November 10, 1959 for distribution to shareholders January 12, 1960.

[fol. 536] President's Letter

March 4, 1960.

To the Shareholders of Diebold, Incorporated:

In 1959, your Company's 100th anniversary year, earnings were $3,529,357 before provision for Federal and Canadian income taxes. Before-tax earnings in 1958 were $3,103,234.

Net earnings for the year 1959 after provision for Federal and Canadian income taxes were $1,779,357, equal to $2.77 per common share. In 1958, net earnings after-taxes were $1,567,096, or $2.44 per common share. The per share earnings for both years are computed on the basis of the 643,296 common shares outstanding at December 31, 1959.

Cash dividends of $.15 per common share were paid on March 31st, June 12th, September 12th and December 31st, 1959.

A 5% stock dividend was declared November 10, 1959, for distribution January 12, 1960, to shareholders of record December 18, 1959.

Audited statements are shown on pages 5 through 10 of this report. A ten year summary of financial highlights is shown on pages 5 and 6.

On September 11, 1959 your Company acquired all of the assets, business and properties of the Herring-Hall-Marvin Safe Company of Hamilton, Ohio, except the corporate franchise, a few minor investments, and certain insurance policies, for $3,000,000 plus the assumption of substantially all of the liabilities. The operating results of this new acquisition from September 11th, only, are included in the above figures for 1959.

The Herring Hall-Marvin Safe Company manufactures, in a well maintained and equipped 300,000 square foot plant, bank counter equipment, nuclear shielding doors and other protective devices, a full line of security files which are specified by the Federal Government for the storage of classified documents, fire resistive safes and doors, burglary resistive chests and doors, and drive-up and walk-up windows. We are now operating and intend to continue to operate this acquisition as the Herring-Hall-Marvin Safe Company Division, Diebold, Incorporated, and

are continuing the product lines of the former company. It is planned that the Herring-Hall-Marvin sales organization will be maintained as a separate entity. The distinctive styling of the Herring-Hall-Marvin products will be continued and the Herring-Hall-Marvin line will be aggressively promoted.

This acquisition makes available to your Company additional manufacturing space, which is urgently required for the expansion of our business and broadens our product line in the bank counter equipment, nuclear products, security and insulated file lines, and other product lines now under development. We just could not have realized further expansion of Diebold product lines in our present manufacturing facilities.

On August 24, 1959, the Department of Justice filed a complaint in the Federal District Court in Cincinnati, Ohio, challenging the acquisition of the Herring-Hall-Marvin Safe Company under Section 7 of the Clayton Act and was granted a temporary restraining order. On September 2, 1959, the Court found that the evidence did not warrant the injunctive relief sought and dissolved the restraining order theretofore issued. Thereupon the acqu-sition of the Herring-Hall-Marvin Safe Company was completed. The Justice Department has continued their [fol. 537] complaint under Section 7 of the Clayton Anti-Trust Act and this matter is now in the process of litigation. Your officers are convinced that the acquisition will finally be vindicated as an aid . . . not a hindrance to competition.

On September 15, 1959, the Flofilm Division of Diebold, Incorporated was sold to the Photostat Corporation, a subsidiary of the Itek Corporation. The Flofilm Division accounted for less than 5% of the total sales of Diebold, Incorporated.

The sale was made to enable your Company to concentrate its resources—both financial and human—on the Herring-Hall-Marvin acquisition and to the marketing and developing of new products in the records housing and records handling field, such as our new line of data processing accessory equipment.

We believe that this sale was in the best interest of Diebold stockholders and customers.

In order to complete the purchase of the Herring-Hall-Marvin Safe Company, on October 8th your Company obtained a $1,500,000 five-year term loan from banks and sold at par $2,216,000 of First Mortgage 5¾% Sinking Fund Bonds due and payable in 1974. Part of the proceeds from the sale of these bonds were used to retire fully the $1,300,000 of First Mortgage 5% Sinking Fund Bonds due and payable in 1970.

In addition, we sold an additional $284,000 of First Mortgage 5¾% Sinking Fund Bonds at par on January 31, 1960 so that at this time we have $2,500,000 of such bonds outstanding.

We are required to repay the $1,500,000 Term Loan from banks in five equal annual installments of $300,000 each, commencing in 1960.

The repayment of the $2,500,000 Sinking Fund Bonds will be made by paying to a Contingent Sinking Fund commencing May 1, 1960 and on May 1 of each year thereafter up to and including 1964 the lesser of $100,000 or 10% of the consolidated net income of the Company for the fiscal year next preceding such May 1 and thereafter beginning July 1, 1965 payments are to be made at the rate of $200,000 per year until all of said bonds are fully paid.

Our labor and material costs are increasing at a rate that has not, as yet, been compensated for by relief through price increases; the effect of such increases in cost has been overcome by increased sales volume and productivity. Like most businesses, it becomes increasingly more difficult to offset these continued increases in costs. On balance, however, we believe that your Company will convert its high backlog of orders and the high level of acceptance of its products into a successful 1960.

Sincerely, Raymond Koontz, President.

[fols. 538-539]

Ten Year Financial Highlights 1950-1959

	1959	1958	1957	1956	1955	1954	1953	1952	1951	1950
	(Note A)	(Note A)	(Note A)							
Net income (after taxes)	$1,779,357	$1,567,096	$1,341,911	$1,025,999	$ 704,755	$ 457,095	$ 415,956	$ 411,515	$ 445,316	$ 584,111
Cash dividends paid—										
Preferred	—0—	—0—	3,431	20,081	22,500	22,500	22,500	22,500	22,500	22,500
Common	384,948	368,468	343,163	187,761	141,076	70,424	61,029	0	0	—0—
Dividends paid in common stock	(Note C)	313,970	235,476	1,632,382	—0—	94,475	—0—	0	0	0
Expenditures for capital equipment	515,379	986,067	423,883	352,051	289,292	261,305	141,410	135,752	253,209	239,006
Depreciation and amortization	389,397	327,635	268,386	189,291	182,094	181,404	176,512	167,667	157,091	127,858
Net working capital (end of year)	8,376,070	6,525,111	6,113,618	5,676,437	5,488,482	4,998,915	1,687,454	3,449,235	3,127,186	2,687,820
Shares of common stock outstanding (end of year)	643,296	637,997	576,228	490,975	141,466	140,861	122,059	122,059	122,014	121,000
Earnings per common share after provision for preferred dividends (Note B)	2 77	2 44	2 08	1 56	1 06	68	61	60	66	87
Book value per common share (Note B)	14 67	12 42	10 51	9 09	8 01	7 15	6 56	6 04	5 54	4 76

Note A—The 1957, 1958 and 1959 figures are for Diebold, Incorporated and subsidiaries. The figures for all prior years are for Diebold, Incorporated, only.
Note B—Adjusted to the basis of the 643,296 common shares outstanding at December 31, 1959.
Note C—A 5% stock dividend was declared November 10, 1959 for distribution to shareholders January 12, 1960.

[fols. 540-541]

Diebold, Incorporated and Subsidiaries Consolidated Balance Sheets

December 31, 1959 and December 31, 1958

Assets	December 31, 1959	December 31, 1958
Current Assets		
Cash	$ 2,673,864	$ 3,040,531
Trade notes and accounts receivable—less reserves ($53,075—1958, $34,772)	6,117,240	4,672,865
Inventories—principally at cost (first-in, first-out basis) less collection on sales contracts	4,839,590	2,861,215
Miscellaneous receivables, travel advances, etc.	359,605	67,506
Prepaid insurance, taxes and other expenses	316,613	227,704
Total Current Assets	14,306,912	10,869,821
Investments and Other Assets	55,550	87,044
Property, Plant and Equipment		
Land, buildings and equipment, at cost	7,607,045	5,727,371
Less reserves for depreciation and amortization	3,282,657	3,151,296
	4,324,388	2,576,075
Patents (at nominal value)	1	1
	$18,686,851	$13,532,941

Liabilities and Shareholders' Equity	December 31, 1959	December 31, 1958
Current Liabilities		
Notes payable	$ 17,958	$ —0—
Trade accounts payable	1,710,380	1,290,885
Long term debt payable—current portion	400,000	100,000
Accrued salaries, wages and commissions	1,267,003	853,359
Advances on service contracts, etc.	329,726	320,754
Accrued taxes, royalties and other expenses	871,478	484,903
Income taxes and other items withheld from employees	268,196	187,389
Provision for Federal taxes on income (estimated) less current payments	1,066,101	1,107,420
Total current Liabilities	5,930,842	4,344,710
Long Term Debt		
Term bank loans, less current portion	1,200,000	—0—
First mortgage 5% sinking fund bonds, due November 1, 1970, less current portion	—0—	1,200,000
First mortgage 5¾% sinking fund bonds, due July 1, 1974, less current portion	2,116,000	—0—
Total Long Term Debt	3,316,000	1,200,000
Shareholders' Equity		
Capital Stock:		
Common, par value $5.00 a share; authorized 900,000 shares; issued 643,296 (1958—637,997) shares; reserved for payment of stock dividend January 12, 1960, 32,164 shares; reserved for sale to employees 15,610 (1958—20,172) shares including 15,355 (1958—17,433) shares presently under option	3,253,111	3,198,092
Earnings Retained in the Business	6,186,898	4,790,139
Total Shareholders' Equity	9,440,009	7,988,231
	$18,686,851	$13,532,941

Note A—First Mortgage 5¾% sinking fund bonds are collateralized by a first mortgage on property, plant and equipment and all common and preferred stocks of subsidiaries. Under the supplemental indenture of mortgage the Corporation is required to pay into a contingent sinking fund on May 1 in each of the years 1960 through 1964 the lesser of $100,000 or 10% of the consolidated net income of the Corporation for the fiscal year next preceding such May 1 and $200,000 into a fixed sinking fund on July 1 in each of the years 1965 through 1973. The indenture contains the usual provisions applicable to this type of financing, including those relating to the payment of dividends, maintenance of net current assets, etc. On January 31, 1960, the Corporation sold an additional $284,000 of 5¾% bonds which increased the total outstanding bonds to $2,500,000.

Note B—The agreement with two banks for the term loan of $1,500,000 provides for repayment in five equal consecutive annual installments together with interest at 5% per annum, beginning July 1, 1960.

Note C—Sales for 1959 subject to renegotiation represent only a small part of total sales and the refund, if any, thereon should have no material affect on the financial statements.

Note D—Financial statements of the Canadian subsidiaries are included in consolidated financial statements on a dollar-for-dollar basis.

Note E—There are pending against the Corporation several actions in various courts, which, in the opinion of the Corporation's legal counsel, are without merit and cannot involve more than an insignificant amount and a civil suit filed by the Department of Justice alleging that the purchase of the assets, business and properties of the Herring-Hall-Marvin Safe Company violates Section 7 of the Clayton Anti-Trust Act, which is more fully explained in the accompanying letter of the Corporation's President

[fol. 542] Diebold, Incorporated and Subsidiaries

Statements of Income and Earnings Retained in the Business

Statement of Income	Year Ended December 31, 1959	Year Ended December 31, 1958
Gross profit from products and services sold	$11,851,523	$10,299,367
Selling, advertising, administrative and general expenses	8,438,536	7,131,152
	3,412,987	3,168,215
Other income	279,058	63,312
	3,692,045	3,231,527
Other deductions:		
Interest charges	117,047	72,118
Miscellaneous	45,641	56,175
	162,688	128,293
Income before Federal taxes on income	3,529,357	3,103,234
Federal taxes on income—estimated	1,750,000	1,536,138
Net Income	$ 1,779,357	$ 1,567,096
Earnings Retained in the Business		
Unappropriated:		
Balance at January 1	$ 4,790,139	$ 3,875,200
Add:		
Net income for the period	1,779,357	1,567,096
Other additions	2,350	—0—
	6,571,846	5,442,296
Deduct:		
Cash dividends paid or provided for:		
Common—four dividends at 15¢ a share paid on shares outstanding at the respective dividend dates	384,948	368,468
Less 1957 declaration paid in 1958	—0—	90,694
	384,948	277,774
Dividends paid in common stock at par (plus $23,225 paid in 1958 in lieu of fractional shares)	—0—	313,970
Other deductions	—0—	60,413
	384,948	652,157
Earnings Retained in the Business at December 31	$ 6,186,898	$ 4,790,139

[fol. 543] Accountant's Certificate

HALL, KISTLER & COMPANY
Certified Public Accountants

315 First National Bank Building

Telephone 3-9113

Canton, Ohio

February 29, 1960

Board of Directors and Shareholders,
Diebold, Incorporated,
Canton, Ohio.

We have examined the Consolidated Balance Sheet of Diebold, Incorporated, and subsidiaries as of December 31, 1959, and the related Statements of Consolidated Income and Consolidated Earnings Retained in the Business for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. The financial statements of one small subsidiary and the Herring-Hall-Marvin Safe Company Division have been included as reported by other Certified Public or Chartered Accountants.

Trade accounts receivable were tested by mailing statements of accounts to a representative number of customers selected for that purpose. Inventories are based upon physical counts made during the last quarter of 1959 and adjusted for subsequent transactions and the amount paid for inventories at Hamilton, Ohio, on September 11, 1959, plus or minus subsequent recorded changes, and work in process at Canton, Ohio, at book value, which is only 5% of the total inventories.

In our opinion, the accompanying Consolidated Balance Sheet and related Statements of Consolidated Income and Earnings Retained in the Business present fairly the consolidated financial position of Diebold, Incorporated, and subsidiaries at December 31, 1959, and the consolidated results of their operations for the year then ended, in con-

formity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Hall, Kistler & Company, Certified Public Accountants.

[fol. 544] ATTACHMENT TO AFFIDAVIT—REPORT TO SHAREHOLDERS FOR THE 9 MONTHS ENDED SEPTEMBER 30, 1960 BY DIEBOLD, INCORPORATED

October 27, 1960.

To the Shareholders of Diebold, Incorporated:

After provision for Federal and Canadian income taxs, your Company earned $1,332,107, equal to $1.96 a common share, in the first nine months of 1960.

Net earnings in 1959 during the equivalent period were $1,202,749, equal to $1.77 a common share.

The earnings per common share for both the 1960 and the 1959 periods are based on the 680,630 common shares outstanding at September 30, 1960.

Cash dividends of $.15 a common share were paid on March 31, June 10, and September 12, 1960. On October 11, 1960 a cash dividend of $.15 a common share was declared payable December 31, 1960 to holders of record on December 12, 1960.

A 5% stock dividend was distributed on January 12, 1960. Another 5% stock dividend was declared on October 11, 1960 which will be distributed on January 16, 1961 to shareholders of record on December 19, 1960. A form of scrip will be issued in place of fractional shares.

On September 30, 1960 we prepaid $150,000 on our term loan to banks, which reduced the current portion of our notes payable to banks to $150,000. We expect to make a payment in October which will reduce this current liability for notes due banks to zero.

We are sorry to have to inform you of the death on September 24th of Mr. Ralph J. Wann, a valued member of the Diebold organization and a Director of your Company since 1951. Mr. Wann gave us the benefit of both a wide business experience and an invaluable knowledge of people and conditions in the West. All of us who knew Mr. Wann will miss him very much.

Record.

We are continuing our aggressive program to market our new Data Processing Accessory Equipment product line and the new Under-Counter Equipment line for banks. This additional sales volume will be needed to compensate for increases in costs that just cannot be recovered through offsetting increases in our selling prices.

It appears that results for the full year 1960 will set record highs for both sales and earnings.

Sincerely, Diebold, Incorporated, Raymond Koontz, President.

[fols. 545-546]

Diebold, Incorporated and Subsidiaries Consolidated Balance Sheets

September 30, 1960 and December 31, 1959

Assets	September 30, 1960	December 31, 1959
Current Assets		
Cash	$ 2,801,919	$ 2,673,864
Trade notes and accounts receivable less reserves ($52,500 —1959 $53,075)	6,772,220	6,117,240
Inventories—less reserves and progress payments received on sales contracts	4,202,496	4,839,590
Miscellaneous receivables, travel advances, etc.	168,295	359,605
Prepaid insurance, taxes and other expenses	477,019	316,613
Total Current Assets	14,421,949	14,306,912
Investments and Other Assets	300	55,550
Property, Plant and Epuipment		
Land, buildings and equipment, at cost	7,664,451	7,607,045
Less reserves for depreciation and amortization	3,459,642	3,282,657
	4,204,809	4,324,388
Patents (at nominal value)	1	1
	$18,627,059	$18,686,851

Liabilities and Shareholders' Equity	September 30, 1960	December 31, 1959
Current Liabilities		
Notes payable	$ —0—	$ 17,958
Trade accounts payable	971,640	1,710,380
Long term debt payable—current portion	250,000	400,000
Accrued salaries, wages and commissions	1,074,085	1,267,003
Advances on service contracts, etc.	—0—	329,726
Accrued taxes, royalties and other expenses	1,120,061	871,478
Income taxes and other items withheld from employees	260,567	268,196
Provision for Federal taxes on income (estimated) less current payments	1,028,755	1,066,101
Total Current Liabilities	4,705,108	5,930,842
Long Term Debt		
Term bank loan, less current portion	900,000	1,200,000
First mortgage 5¾% sinking fund bonds, due July 1, 1974, less current portion	2,300,000	2,116,000
Total Long Term Debt	3,200,000	3,316,000
Deferred Income	172,297	—0—
Shareholders' Equity		
Capital Stock:		
Common, par value 5.00 a share; authorized 900,000 shares; issued 680,630 (1959—643,296) shares: reserved for sale to employees 10,232 (1959—15,610) shares including 9,977 (1959—15,355) shares presently under option	3,472,527	3,253,111
Earnings Retained in the Business	7,077,127	6,186,898
Total Shareholders' Equity	10,549,654	9,440,009
	$18,627,059	$18,686,851

Note A—First Mortgage 5¾% sinking fund bonds are collateralized by a first mortgage on property, plant and equipment and all common and preferred stock of subsidiaries. Under the supplemental indenture of mortgage the Corporation is required to pay into a contingent sinking fund on May 1 in each of the years 1961 through 1964 the lesser of $100,000 or 10% of the consolidated net income of the Corporation for the fiscal year next preceding such May 1 and $200,000 into a fixed sinking fund on July 1 in each of the years 1965 through 1973. The indenture contains the usual provisions applicable to this type of financing, including those relating to the payment of dividends, maintenance of net current assets, etc.

Note B—The agreement with two banks for the term loan requires us to pay $150,000 on July 1, 1961 and three consecutive annual installments of $300,000 each beginning July 1, 1962 together with interest at the rate of 5% per annum.

Note C—Sales for 1959 subject to renegotiation represent only a small part of total sales and the refund, if any, thereon should have no material effect on the financial statements.

Note D—Financial statements of the Canadian subsidiaries are included in consolidated financial statements on a dollar-for-dollar basis.

Note E—The figures contained in the September 30, 1960 Balance Sheet and the accompanying Statements of Income and Earnings are unaudited and thus subject to possible year-end revision.

[fol. 547]

Diebold, Incorporated and Subsidiaries

Statements of Income & Earnings Retained in the Business

	9 Months Ended Sept. 30, 1960	9 Months Ended Sept. 30, 1959
Income		
Gross profit from products and services sold	$9,751,478	$7,991,010
Selling advertising, administrative and general expenses	6,935,625	5,695,962
	2,815,853	2,295,048
Other income	80,269	238,128
	2,896,122	2,533,176
Other deductions:		
Interest charges	157,460	66,018
Miscellaneous	43,255	31,589
	200,715	97,607
Income before Federal taxes on income	2,695,407	2,435,569
Federal taxes on income—estimated	1,363,300	1,232,820
Net Income	$1,332,107	$1,202,749
Earnings Retained in the Business		
Unappropriated:		
Balance at January 1	$6,186,898	$4,790,139
Add:		
Net income for the period	1,332,107	1,202,749
Other additions	23,860	15,968
	7,542,865	6,008,856

Diebold, Incorporated and Subsidiaries

Statements of Income & Earnings Retained in the Business

	9 Months Ended Sept. 30, 1960	9 Months Ended Sept. 30, 1959
Deduct:		
Cash dividends paid or provided for:		
Paid—Common $.45 a share	304,914	288,454
Dividends paid in common stock at par	160,824	—0—
	465,738	288,454
Earnings Retained in the Business at September 30	$7,077,127	$5,720,402

Financial Summary	9 Mos. ended Sept. 30, 1960 (Note A)	9 Mos. ended Sept. 30, 1959 (Note A)	Year 1959 (Note A)	Year 1958 (Note A)	Year 1957 (Note A)	1956	1955
Net income (after taxes)	$1,332,107	$1,202,749	$1,567,357	$1,567,096	$1,341,911	1,025,999	$ 704,755
Cash dividends paid—							
Preferred	—0—	—0—	—0—	—0—	3,431	20,081	22,500
Common	304,914	288,454	384,948	368,468	343,163	187,761	141,076
Dividends paid in common stock	160,824	—0—	—0—	313,970	235,476	1,632,382	—0—
Expenditures for capital equipment	261,734	289,908	515,379	986,067	423,883	352,051	289,292
Depreciation and amortization	340,033	265,426	389,397	327,635	268,386	189,291	182,094
Net working capital (end of period)	9,716,841	8,087,343	8,376,070	6,525,111	6,113,618	5,676,437	5,488,482
Earnings per common share after provision for preferred dividends (Note B)	1.96	1.77	2.61	2.30	1.97	1.48	1.00
Book value per common share (Note B)	15.50	13.16	13.87	11.74	9.94	8.59	7.57

Note A—The 1957, 1958, 1959 and 1960 figures are for Diebold, Incorporated and subsidiaries. The figures for prior years are for Diebold, Incorporated, only.

Note B—Adjusted to the basis of the 680,630 common shares outstanding at September 30, 1960.

[fol. 548] ATTACHMENT TO AFFIDAVIT—OPTION AGREEMENT

This Agreement made and entered into this —— day of June, 1959 by and between Herring-Hall-Marvin Safe Company, an Ohio corporation with its principal office at Hamilton, Ohio (hereinafter called "Optionor"), and Diebold, Incorporated, an Ohio corporation with the principal office at Canton, Ohio (hereinafter called "Optionee").

Witnesseth:

That said Optionor, for and in consideration of One Hundred Dollars ($100.00), receipt of which is hereby acknowledged by the Optionor, does hereby give and grant to the Optionee or its assignee the exclusive right and option to purchase from the Optionor on or before July 31, 1959 the entire assets, business, properties and good will of Optionor, whether situated within or without the United States of America, save only the franchise of the Optionor as a corporation, all as more specifically enumerated and described, and upon the terms and conditions set forth in the Agreement of Purchase and Sale attached hereto marked Exhibit A and made a part hereof.

The undersigned, Warren Mosman, for the consideration aforesaid, hereby represents to the Optionee that appropriate action has been taken by the Board of Directors of the Optionor authorizing the execution of this option in the name and on behalf of the Optionor, and further represents and warrants that he, as the holder of 5,250 of the outstanding capital shares of the Optionor, will take such action as is necessary to cause the Optionor, forthwith upon [fol. 549] the exercise of this option, to lawfully call a shareholders meeting to take all actions required of the shareholders by the statutes of the State of Ohio necessary to authorize the sale contemplated by this option, and to amend the Articles of Incorporation of the Optionor to change its name from "Herring-Hall-Marvin Safe Company" to such other name as it may desire, not, however, including in such new name any words contained in its present corporate name other than the word "Company", and will request the Directors of said Optionor to take appropriate action to consent in due form to the use by the Optionee of the name "Herring-Hall-Marvin Safe Com-

pany," or any similar name, as the name of any corporation which the Optionee may desire to incorporate in any state or foreign country, or to consent to the change of name of any present or newly organized subsidiary of Optionee to the name "Herring-Hall-Marvin Safe Company" or a similar name, and that he will vote his said shares in favor of any actions required by the shareholders under the terms of this option and under the terms of the Agreement of Purchase and Sale (Exhibit A hereof) at said meeting, or any other meeting, necessary to fully effectuate and consummate the purchase and sale contemplated by this Option Agreement and by the Agreement of Purchase and Sale (Exhibit A).

The Optionor agrees that upon the execution and delivery of this option it will, at reasonable times during regular business hours, permit the duly designated representatives of the Optionee to make an inspection by a plant tour in company with the President of Optionor of the plants, machinery, equipment and inventories of the Optionor, and to examine such other records pertaining to the operation of Optionor's business as Optionor may, in its sole discre- [fol. 550] tion, permit in order to enable the Optionee to ascertain the condition of Optionor's assets and business.

The Optionee, if it shall desire to exercise the option herein granted, shall notify the Optioner at its principal office at Hamilton, Ohio in writing, delivered personally to said office, or by registered mail addressed to the Optionee at said office, which personal delivery shall be made on or before the date herein specified, or if delivery is made by registered mail, then it shall be by such registered letter deposited in the Post Office in Canton, Ohio on or before the aforesaid date. The Optionor and Optionee each agree that, immediately upon delivery of said notice of exercise of the option by the Optionee, they will forthwith, and in no event later than two days thereafter, meet and execute in duplicate the Agreement of Purchase and Sale in the form attached hereto as Exhibit A, with such changes or amendments thereto as may mutually be agreeable to the parties, and each party shall thereupon receive one copy of said executed Agreement of Purchase and Sale.

This option shall be binding upon the Optioner, its successors and assigns.

In Witness whereof, the Optionor, Herring-Hall-Marvin Safe Company, has caused its corporate signature to be hereunto affixed by Warren Mosman, its President, and attested by V. Ault Mosman, its Secretary, duly authorized by resolution of its Board of Directors, and Warren Mosman has hereunto set his hand to evidence his consent and agreement to the terms and provisions hereof, all as of the day [fol. 551] and year first above written.

Herring-Hall-Marvin Safe Company, By ——, ——, Its President, Warren Mosman. Diebold, Incorporated, By ——, ——, Its President.

Attest:

——, ——, Secretary.

Executed in the presence of:

Attest:

——, ——, Its Secretary.

[fol. 552] ATTACHMENT TO OPTION AGREEMENT—AGREEMENT OF PURCHASE AND SALE

This Agreement of Purchase and Sale made and entered into this day of July, 1959, by and between Diebold, Incorporated, an Ohio corporation with its principal office in the City of Canton, Ohio, (hereinafter referred to as "Purchaser") and Herring-Hall-Marvin Safe Company, an Ohio corporation with principal office at Hamilton, Ohio (hereinafter referred to as the "Seller"),

Witnesseth:

Whereas, the Directors of the Seller, by resolution duly adopted at a meeting of said Directors duly and lawfully convened and held at the City of Hamilton, Ohio on the 13th day of June, 1959, have determined upon the sale of all of the properties and assets of the seller, in the manner, upon the terms, and for the price and consideration hereinafter particularly recited and provided, which price and consideration said Directors have found to be fair and at least

equal in value to the value of the assets and properties hereby agreed to be sold, and have, by said resolution, duly authorized the President and the Secretary of the Seller to grant to Purchaser hereunder an option in the form heretofore executed and delivered to acquire said properties and assets, and upon exercise of said option by Purchaser to enter into, execute and deliver, in the corporate name and on behalf of the Seller, this Agreement of Purchase and Sale (hereinafter referred to as "Agreement"), and thereafter to execute and deliver such deeds, assignments and other instruments of transfer and conveyance and all other docu-
[fol. 553] ments, and to perform such other acts as may be necessary or expedient fully to carry this Agreement into execution; and

Whereas, said resolution of the Directors of the Seller, and this Agreement, has been, or will be duly and lawfully approved and authorized by the Shareholders of the Seller, by the vote of Shareholders entitled to exercise the proportion of the voting power of the Seller required by the Statutes of the State of Ohio for such purposes; and

Whereas, the Purchaser has by due and lawful corporate action and upon resolution of its Directors, determined upon and authorized the purchase of all the assets and properties of the Seller as herein provided, for the price herein stipulated, which price and consideration herein stipulated the Directors of the Purchaser have found and determined to be equal to and not greater than the value of the assets and properties so to be purchased; and

Whereas, the Directors of the Purchaser further authorized the President or a Vice President and the Secretary or Assistant Secretary or Treasurer in the corporate name and behalf of the Purchaser, to enter into, execute and deliver this Agreement:

Now, therefore, in consideration of the premises and of the respective covenants, agreements and undertakings of the parties herein set forth, and in further consideration of the sum of One Dollar ($1.00), by each of the parties to the other paid, receipt whereof is hereby acknowledged,

It is Hereby Agreed by and Between the Parties Hereto as Follows:

[fol. 554] First: Seller agrees to sell, transfer and convey to the Purchaser or its nominee, and Purchaser agrees to

purchase from the Seller for the purchase price payable upon the terms hereinafter set forth in Section Fourth (a), the entire assets, business and properties of Seller, tangible, intangible or mixed, including any and all subsidiaries or divisions of said Seller, and, without limiting the generality of the foregoing, such sale to include all of Seller's manufacturing plant or plants, lands, buildings, machinery, dies, jigs, fixtures and equipment, patterns and moulds, and office furniture, equipment and machines, materials (raw and in process of manufacture), manufactured products, supplies, merchandise, cash on hand and in bank, all bid and performance deposits, bills, notes and accounts receivable, claims, demands, rights and choses in action, and Seller's rights in and to all collateral or other security held for the payment of the same, shares and securities of subsidiaries and other corporations, patents, applications for patents, inventions, rights to inventions, trademarks, trade names, copyrights, brands, manufacturing or other licenses or rights, shop-rights, contracts of sale or purchase, employment contracts, insurance contracts (excepting those life insurance contracts on the lives of Warren Mosman, Harvey L. Henkel and Howard E. Edwards in the aggregate face amount of $1,050,000), union contracts governing wages and working conditions to the extent the Seller may assign the same, and all contracts of every other nature, and all income and other rights arising from or under any of the foregoing, all Seller's interests in pension or retirement funds, all prepayments and reserves in Workmen's Compensation or [fol. 555] Unemployment Compensation funds, all refunds of income, sales, use, excise or other taxes of every kind or refunds or credits pertaining to insurance contracts to which the Seller is or may become entitled (other than on the excepted policies), all leases of real or personal property in favor of or granted by the Seller, all conditional sales contracts held by the Seller, service contracts, dealer's franchises, export dealer's franchises, escrow agreements and funds or property covered thereby, foreign exchange, the exclusive right to use the name "Herring-Hall-Marvin Safe Company", and the right to the use of any other brand or trade names presently owned by and/or used or heretofore used by the Seller, subject to outstanding rights, if any, of third persons, good will and all other property, real, per-

sonal and mixed, tangible and intangible, of the Seller, and whether situated or located within or without the United States, save only the franchise of the Seller as a corporation and its corporate minute books, shareholder's record books, share certificate books, corporate seal, and the insurance policies above excepted.

Second: The Seller covenants and agrees:

(a) That forthwith following the execution of this Agreement, it will cause all actions, not already taken, to be taken by its shareholders necessary to authorize the sale contemplated by this Agreement and the amendment of its Articles of Incorporation to change its name from "Herring-Hall-Marvin Safe Company" to such other name as it may desire, not, however, including [fol. 556] in such new name any of the individual words contained in its present corporate name other than the word "Company". If requested by Purchaser, Seller will give its corporate consent in due form to the use by Purchaser of the name "Herring-Hall-Marvin Safe Company" or any similar name, as the name of any corporation to be organized by Purchaser in any state or foreign country, or consent to the change of name of any present or newly organized subsidiary of Purchaser to the name of Herring-Hall-Marvin Safe Company or a similar name.

(b) That contemporaneously with the payment and delivery of the price and consideration hereinafter provided to be paid and delivered by the Purchaser, the Seller will, by appropriate deeds, bills of sale, assignments and other instruments, approved by counsel for the Purchaser, and with general warranties of title therein as are satisfactory to Purchaser, convey, assign and transfer to the Purchaser or its nominee, a good merchantable title to all the property hereby agreed to be sold as aforesaid, and will deliver possession of such property as soon thereafter as may be required by the Purchaser; such conveyances, assignments and transfers to be made free and clear of all encumbrances, save and except chattel mortgages securing obligations reflected on the balance sheet as of April 30, 1959, and, as to real property, any easements or rights of way of

record, and current real estate taxes not yet due and [fol. 557] payable, and save and except liabilities of the Seller which are hereinafter assumed by the Purchaser.

(c) That after the consummation of the closing hereunder, Seller shall not have the right to use, or to grant to any other person the right to the use of, the name "Herring-Hall-Marvin Safe Company", or any other brand or trade names owned or used by the Seller on the date of closing or theretofore in any manner used by the Seller in the conduct of its business prior to the date of closing, and that it has not from or after April 30, 1959 transferred, assigned or granted the right to the use of any such aforesaid names or brands to any person.

(d) That it will, immediately following the mailing of notice of its special meeting of shareholders or as soon thereafter as is reasonably possible, if the same shall not already have been done, make available to the Purchaser for examination:

(1) certificate of title insurance, certified or recertified to the date of delivery (or a complete abstract or abstracts of title brought to date) covering all its real estate, with surveys and descriptions thereof, and all available documents of title to its real and personal property;

(2) all documents relating to its patents, patent applications, copyrights, trademarks, trade names, brands, licenses, etc.;

(3) the Seller's schedule of machinery, equipment, furniture, fixtures and supplies, wherever situated, [fol. 558] and permit the Purchaser, if it so desires, to prepare such schedule if no such schedule is maintained by the Seller and it will permit representatives designated by Purchaser to make a complete inspection of its plant and machinery, wherever situated.

Third: Seller represents and warrants:

(a) That it is duly incorporated and organized under the laws of the State of Ohio, and that its corporate existence and powers granted by the Articles of Incorporation of the corporation will be unimpaired at the date of closing.

(b) That the Board of Directors, by which this Agreement has been or will be approved and authorized, is legally constituted, that its acts touching this Agreement have been or will be duly approved and authorized by the requisite majority of the Sellers' Shareholders and that its officers executing this Agreement are duly authorized in the premises;

(c) That its books of account to its best knowledge and belief truly reflect the assets, liabilities and financial condition of the Seller in accordance with generally accepted principles of accounting and that the Seller has not contracted any obligations, indebtedness or liability other than in the usual course of business.

(d) That its balance sheet as of April 30, 1959 does not reflect the insurance policies on the lives of Warren Mosman, Harvey L. Henkel and Howard E. Edwards, or any liabilities related thereto; that said balance sheet [fol. 559] truly and accurately, in accordance with generally accepted principles of accounting applied on a basis consistent with those of prior years, reflects all of the other assets, liabilities and net worth of Seller as of said date.

(e) That, except as may have occurred in the usual and ordinary course of business, there has been no material change in the Seller's properties, assets and liabilities and that its financial condition and the relationship between its assets and liabilities are not now materially different from those existing as reflected by the balance sheet of April 30, 1959, furnished to the Purchaser, and that the net worth of the Seller, at the time of execution of this Agreement is not materially less than its net worth as reflected on its balance sheet as of April 30, 1959, a copy of which is attached hereto as Exhibit 1.

(f) That the Seller is the true and lawful owner of all the properties and assets hereby agreed to be sold, and holds good and merchantable title thereto, free and unencumbered, except as to chattel mortgages securing obligations reflected on the balance sheet as of April 30, 1959, and, as to real property, easements and rights of way of record and current real estate taxes not yet due and payable.

(g) That, except as to those it will have revealed to Purchaser prior to the date of closing, it has no employment contracts or other long-term commitments or contracts, having an unexpired term of more than one year from the date of execution hereof, or that are not subject to cancellation by Seller, without penalty, within one year from date of execution hereof. [fol. 560] (h) That it will, after the date of execution hereof and pending the consummation of the purchase and sale herein provided for, continue the operation of its business in all its aspects in the usual and ordinary manner and will not incur any unusual or extraordinary obligations or expenditures without the consent of the Purchaser or materially change its present financial and asset condition.

(i) That all taxes of the Seller which have become due and payable to the date hereof, have been fully paid and satisfied or sufficient reserves have been established to meet the same, except as to federal income taxes due from Seller for its fiscal year ended June 30, 1959, and subsequent thereto to the date of closing.

Fourth: The Purchaser convenants, agrees and warrants:

(a) That contemporaneously with the execution and delivery by the Seller of the deeds, bills of sale, assignments and other instruments of conveyance and transfer and other documents herein required of the Seller to be executed and delivered, and delivery of possession of the Seller's properties, assets and business as contemplated hereunder to the Purchaser, the Purchaser will pay to the Seller the sum of Three Million Dollars ($3,000,000.00) less the sum of One Hundred Dollars ($100.00) paid as the option consideration and less the amount of any dividend declared and paid by Seller after April 30, 1959, and less any premiums paid by Seller on the policies of life insurance on the lives of Messrs. Mosman, Henkel and [fol. 561] Edwards after April 30, 1959; such balance of the purchase price to be paid by certified check or draft to the Seller's order.

(b) To perform and carry out Seller's obligations and undertakings under any and all contracts, agreements and commitments of Seller transferred or assigned by Seller to Purchaser pursuant to the terms hereof and pertaining or related to the properties, assets and business sold to the Purchaser.

(c) To pay and discharge the debts and liabilities of the Seller reflected on its balance sheet as of April 30, 1959, attached hereto as Exhibit 1, remaining unpaid at the date of closing.

(d) To pay and discharge any and all debts and liabilities of the Seller incurred in the conduct, or arising out of the conduct, of Seller's business in its usual and ordinary course from April 30, 1959, to the date of closing and then remaining unpaid.

(e) To pay and discharge any and all other debts and liabilities of the Seller save and except (i) Federal income tax deficiencies, penalties and interest for all fiscal years prior to the fiscal year beginning July 1, 1958, (ii) claims of the United States of America for recovery of exessive profits under the Renegotiation Act for any profits resulting from contracts subject to renegotiation prior to April 30, 1959, and (iii) any liabilities pertaining to the insurance policies on the lives of Messrs. Mosman, Henkel and Edwards.

(f) To reimburse the Seller for any balance of Seller's Federal income taxes which the Seller is required to pay on its income for the fiscal year ended June 30, 1959, as shown by Seller's corporate income [fol. 562] tax return for said fiscal year, remaining after crediting any advance payments or credits thereon to which the Seller is entitled, and to reimburse Seller for its Federal income taxes at the rate of Fifty-two percent (52%) on Seller's net operating income (determined on a basis consistent with accounting practices and methods for prior years) from the conduct of its present type of business for the period from June 30, 1959, to the date of closing, as shown by Seller's books. Said reimbursement shall be made by the Purchaser promptly following the filing of Seller's corporate income tax returns for each such fiscal year. The Seller agrees that it will, consistent

with its prior accounting practices and methods, close its books for the fiscal year ending June 30, 1959, and prepare and file its federal income tax returns within the time limited by the Internal Revenue Code or any extension or extensions of time granted to Seller. Any overpayments or refunds of said taxes for said fiscal year shall be and become the sole property of the Purchaser and shall be delivered by the Seller to the Purchaser forthwith upon receipt thereof by the Seller. Nothing hereinabove in this paragraph set forth shall be understood to be an assumption by the Purchaser of any indebtedness, liability or obligation of the Seller now existing or hereafter arising or accruing to or in favor of any Shareholder of the Seller on account of accumulated and unpaid but undeclared dividends, or on account of any failure of the Seller [fol. 563] to pay the fair value of its shares to any dissenting Shareholder or any similar liability of the Seller to any of its Shareholders, or any liability for sales, use, excise, income or other taxes imposed upon or accruing against the Seller or its Shareholders arising from or on account of the sale of Seller's properties, assets and business hereunder. Seller agrees to and shall indemnify and save Purchaser harmless from any debts or liabilities of the Seller not specifically assumed by the Purchaser under the terms hereof. Purchaser agrees to and shall indemnify and save the Seller harmless from any and all debts and liabilities assumed by the Purchaser hereunder.

Fifth: The parties mutually agree:

(a) That possession of the properties, assets and business and delivery of deeds and bills of sales and other documents as required by this Agreement, and payment of the purchase price balance, shall be made and given on the day next following the date on which Seller's shareholders shall have approved the purchase and sale herein contemplated, whether or not all details of performance by the parties shall have then been accomplished, and all net income, earnings and profits of the business retained in said business as

reflected in Seller's balance sheet as of April 30, 1959, and which accrue thereafter to the date of closing shall be the property of the Purchaser.

(b) That the sale and purchase herein agreed upon is upon the following bases and the purchase price is allocable to the assets being sold and purchased as [fol. 564] follows:

(1) The cash, accounts, notes, bills receivable and inventories are being sold and purchased at their respective book values as of the date of closing of the purchase.

(2) The remainder of the purchase price shall be allocated to lands, buildings, machinery, equipment, office furniture and equipment, and other assets purchased hereunder, as shall be determined by the Purchaser.

(c) That the duly authorized representative of the Seller shall have access to and the right to examine any of the books, records and documents delivered by the Seller to the Purchaser, when reasonably necessary in connection with the affairs of the Seller, at all reasonable times during a period of five (5) years from the date of this Agreement.

(d) Purchaser shall have the right to employ at its option, any or all of Seller's personnel, in any way connected with or engaged in the business of Seller. It is understood that Seller's obligation in connection with personnel is only that they will be made available for employment by Purchaser and Seller has no liability in the event that any employee shall refuse to accept employment by Purchaser. Seller agrees to cooperate with Purchaser in securing the continued services of Seller's employees.

(e) That Seller shall have the right and option to declare and pay its usual and customary quarterly dividend of fifty cents (50¢) per share on June 30, [fol. 565] 1959 on its outstanding shares, and the purchase price shall be reduced by the amount of such dividend, if so declared and paid.

(f) That Seller shall make available to Purchaser the minute books of the Seller for examination by Pur-

chaser regarding any liability, fixed or contingent, with reference to the assets being purchased and sold hereunder.

(g) That Seller will furnish a list of all known pending litigation and proceedings, whether in court or before any federal or state administrative commission, tribunal or authority in which it is a party.

(h) That Seller will furnish certified copies of the resolutions of its directors and of its shareholders authorizing the execution and delivery of this agreement and so much of the minutes of said meetings as shall sufficiently show such authorization. Purchaser shall furnish Seller with certified copies of the resolutions of its directors authorizing the execution of this agreement.

(i) That any and all of the information obtained by Purchaser in connection with the examination of any of the foregoing documents, books and records of Seller shall be deemed to be confidential information, shall not be divulged to any third person, shall not be used by the Purchaser in the conduct of its business unless and until the purchase and sale contemplated hereunder shall have been fully consummated, in which event only the information obtained from examination of the corporate minute book of the corporation shall [fol. 566] thereafter be deemed confidential.

(j) That each will, by appropriate corporate action, authorize and cause its officers to execute and deliver to the other party hereto, any further papers or documents that may be reasonably deemed necessary or expedient in order to make this Agreement fully effective in all of its terms.

(k) To cooperate and consult with each other in respect to any advertising or publicity in connection with the announcement of the sale herein contemplated, but the time, place and manner of any such announcement shall be the sole province of the Purchaser.

(l) Upon payment of the purchase price by the Purchaser, Seller will deliver, or cause to be delivered, to Purchaser possession of Seller's books of account, ledgers, journals, sales records, purchase records, and all other books, records, papers and correspondence

pertaining to the business of the Seller, save and excepting the Seller's corporate minute books, share certificate books, corporate seal, charter, franchise tax returns, and the insurance policies on the lives of Messrs. Mosman, Henkel and Edwards.

Sixth: This Agreement shall be binding upon and shall inure to the benefit of the respective parties, their successors and assigns, provided, however, that if the consummation of the purchase and sale herein provided for shall be prevented by any restraining order or injunction which shall continue in force and effect for a period longer than [fol. 567] one hundred twenty (120) days from the date of this Agreement, then this Agreement shall be and become, at the close of business on the said one hundred twentieth (120th) day, terminated, and provided, further, however, that by mutual agreement of the parties the aforesaid termination date may be extended for a period of time, not exceeding an additional one hundred twenty (120) days, at the end of which such additional extended period if the purchase and sale herein provided for shall not be fully consummated this Agreement shall be and become terminated. In the event of termination of this Agreement in either manner as aforesaid, then both parties shall be released of their obligations hereunder without any liability whatsoever to each other, except, that the Purchaser shall not be released of its liability to hold and keep confidential and not use in connection with its business any of the information given, acquired or obtained by Purchaser from Seller or acquired or obtained through examination of any of Seller's books, records, or documents relating to the business of the Seller as hereinbefore provided. If the Purchaser shall discover prior to the closing date any material discrepancy or variance in the assets, liabilities or net worth of the Seller from the assets, liabilities and net worth reflected upon the Seller's balance sheet as of April 30, 1959, attached hereto as Exhibit 1, other than discrepancies or variances which shall have arisen from the conduct of Seller's business in the usual and ordinary manner from the option date to the date of closing, then [fol. 568] the Purchaser, at its option, may terminate this Agreement by written notice to the Seller and thereupon

this Agreement shall terminate and both parties shall be relieved of their obligations hereunder without any liability whatsoever to each other, except as to Purchaser's liability to hold and keep confidential and not use in connection with its business any of the information given, acquired or obtained by Purchaser from Seller or through examination of Seller's books, records or documents, relating to the business of Seller as hereinbefore provided.

The closing and consummation of the purchase and sale provided for in this Agreement shall be held at such place in Chicago, Illinois as the parties shall agree upon.

This Agreement shall not be binding on Seller until the same shall have been approved by action of its Shareholders as hereinbefore required.

In Witness Whereof, the parties hereto have executed this Agreement in duplicate, by their proper officers thereunto duly authorized, as of the day and year first above written.

Diebold Incorporated, by ——, ——, President. Attest: ——, ——, Secretary. Herring-Hall-Marvin Safe Company, By ——, ——, President. Attest:——, ——, Secretary.
Signed in the presence of ——, ——.

STATE OF,

County of:

Before Me, a Notary Public in and for said County and [fol. 569] State, appeared Herring-Hall-Marvin Safe Company, a corporation, by Warren Mosman, its President, and V. Ault Mosman, its Secretary, who severally acknowledged that they did execute the foregoing instrument in the name and on behalf of said corporation, and that it is the free act and deed of said corporation and of them individually and as such officers.

In Witness Whereof, I have hereunto set my hand and seal at — this, — day of July, 1959.

——, ——, Notary Public.

Herring-Hall-Marvin Safe Company

Balance Sheet, April 30, 1959

Assets			Liabilities				
Cash on hand and demand deposits		$ 115,507.32	Notes payable—banks				$ 250,000.00
Notes and accounts receivable:			Accounts payable:				
Trade	$1,479,785.07		Trade			$ 431,146.45	
Other	39,850.17		Other			146,852.20	
	1,519,635.24						577,998.65
Less, allowance for doubtful accounts	35,000.00						
		1,484,635.24					
Inventories, less partial payments received on contracts in process		1,642,558.70	Accrued expenses				802,305.20
Prepaid expense		50,205.70	Provision for Federal taxes on income				102,187.67
Total current assets		3,292,906.96	Total current liabilities				1,732,491.52
			Notes payable—other (non-current)				2,000.11
			Capital:				
			Common capital stock, $1 par value; 20,000 shares authorized, 13,450 shares issued, less 7,560 shares in treasury, outstanding 5,890 shares.			5,890.00	
			Surplus:				
Land, buildings and equipment, at cost in cash, or in capital stock	2,689,667.27		Paid-in		$ 59,564.32		
Less, allowance for depreciation	2,035,236.69						
		654,430.58	Earned:				
			Balance, July 1, 1958	$2,059,597.92			
			Net income for ten months ending April 30, 1959	96,633.17			
				2,156,231.09			
Patents		1.00	Less dividends paid	8,838.50			
					2,147,392.59		
						2,206,956.91	
							2,212,846.91
		$3,947,338.54					$3,947,338.54

[fol. 571] ATTACHMENT—AMENDMENT TO AGREEMENT OF PURCHASE AND SALE

It is Hereby Agreed, by and between Diebold, Incorporated, as Purchaser, and Herring-Hall-Marvin Safe Company, as Seller, that the Agreement of Purchase and Sale executed by said parties of even date herewith shall be and the same is hereby amended to provide that paragraph Fifth (a) shall read as follows:

> (a) That possession of the properties, assets and business and delivery of deeds and bills of sale and other documents as required by this Agreement, and payment of the purchase price balance, shall be made on Monday, August 31, 1959, at the hour of 10:00 o'clock A.M. at the offices of Winston, Strawn, Smith & Patterson, Chicago, Illinois, whether or not all details of performance by the parties shall have then been accomplished, and all net income, earnings and profits of the business retained in said business as reflected in the Seller's balance sheet as of April 30, 1959, and which accrue thereafter to the date of closing shall be the property of the Purchaser. The shareholders meeting provided for under article Second (a) of this Agreement shall be held prior to said August 31, 1959, for the purpose of taking action on the necessary authorization and approval of this Agreement, and the notice thereof shall be mailed on or prior to August 20, 1959.

In Witness Whereof the parties hereto have executed this Amendment in duplicate by their proper officers thereunto duly authorized this 17th day of July, 1959.

Diebold, Incorporated, By ——, ——, President. Attest: ——, ——, Secretary. Herring-Hall-Marvin Safe Company, By ——,——, President. Attest: ——,——, Secretary.

Signed in the presence of: ——, ——.

[fol. 572] ATTACHMENT—EMPLOYMENT CONTRACT

This Agreement made and entered into this 16th day of June, 1959, by and between Diebold, Incorporated, an Ohio

corporation with its principal office in Canton, Ohio (hereinafter referred to as "Diebold") and Warren Mosman of Hamilton, Ohio (hereinafter referred to as "Mosman").

Witnesseth:

Whereas, Diebold expects to acquire an option to purchase the assets, properties and business (as will more fully be described in said Option Agreement) of Herring-Hall-Marvin Safe Company, an Ohio corporation with its principal office at Hamilton, Ohio, of which corporation Mosman is and has been the President and chief executive officer; and

Whereas, Diebold, in the event it acquires and exercises said option, desires to avail itself of Mosman's abilities, knowledge and experience in connection with the business of Herring-Hall-Marvin Safe Company; and

Whereas, Mosman is willing to enter the employ of Diebold upon the terms and conditions hereinafter set forth in the event Diebold elects to exercise said option and consummates the purchase of the assets, properties and business of Herring-Hall-Marvin Safe Company pursuant to such option;

Now, Therefore, it is Agreed:

1. Diebold agrees to employ Mosman in an executive capacity for a term of five (5) years, or until his earlier death or physical or mental incapacity, at a salary of Fifty Thousand Dollars ($50,000.00) per year payable [fol. 573] in monthly installments, and for the further period of four (4) years thereafter, or until his earlier death or physical or mental incapacity, at a salary of Twenty-five Thousand Dollars ($25,000.00) per year payable in monthly installments.
2. Mosman agrees to enter into the employ of Diebold on the foregoing terms, and during said initial period of five years agrees to devote his entire time, talents, efforts and abilities to the business of Diebold in such executive capacity as shall be assigned to him from time to time by Diebold, except the reasonable time required by Mosman to direct and attend to the purchases and sales of his personal securities and to the purchases and sales of securities or other assets held

by the present Herring-Hall-Marvin Safe Company, an Ohio corporation; and also agrees that during said secondary period of four years, he will devote such of his time, talents, efforts and abilities to the business of Diebold as said Mosman reasonably shall deem necessary to carry out the assignments allocated to him by Diebold.

3. In the event of Mosman's death, or in the event of any physical or mental incapacity which shall materially interfere with the performance by Mosman of the [fol. 574] duties assigned to him by Diebold, and which physical or mental incapacity shall continue for a period of 180 consecutive days, this contract may be terminated at the option of Diebold, provided, however, that if any such physical or mental incapacity shall have occurred as a result of or in the performance of any of the duties of Mosman hereunder, then this contract shall not be terminated.

4. Mosman agrees that he will fully and faithfully perform, during the term of his employment, his obligations and duties under this Agreement. Mosman also agrees to, and does hereby waive any right to be included in and receive any benefits from the Diebold Salaried Employees Retirement Plan.

5. In the event of breach of the terms and conditions of this Agreement by either party hereto, notice of such claimed breach shall be given by the one party to the breaching party in writing, specifying the claimed breach, and unless such claimed breach shall have been remedied by the alleged breaching party within thirty (30) days from delivery of such notice, then the party claiming such breach shall have the right and option to terminate this Agreement and be relieved from any further obligations hereunder.

[fol. 575] 6. This agreement shall be binding upon Diebold and its successors, provided, however, that this agreement shall not take effect unless and until Diebold shall have exercised its option referred to herein to purchase the assets, properties and business of Herring-Hall-Marvin Safe Company and said purchase shall have been consummated; and if and when said purchase shall have been consummated as afore-

said, then this contract shall become effective as of the date on which said purchase of assets by Diebold is so consummated.

In Witness Whereof, the parties hereto have executed this Agreement in duplicate as of the day and year first above written.

Diebold, Incorporated by Frank D. Robinson, Vice President. Attest: Dwain A. Crawford, Secretary. Warren Mosman.

Executed in the presence of:

Albelt B. Arbaugh, Alexander B. Moody, Witnesses.

[fol. 576] ATTACHMENT—ADDITION TO EMPLOYMENT CONTRACT

It is Hereby Agreed by and between Diebold, Incorporated, an Ohio corporation, and Warren Mosman of Hamilton, Ohio, that the Employment Contract entered into by and between the said parties on the 16th day of June, 1959, be and the same is hereby amended by adding thereto the following Paragraph 7 which shall be incorporated therein as though fully set forth by reference to this Addendum, to-wit:

7. Diebold agrees to pay the reasonable expenses incurred by Mosman during the term or terms of this Agreement in connection with his employment under this Employment Contract, and shall pay the dues incurred by him as a member of Queen City Club, Cincinnati, Ohio, Hamilton City Club, Hamilton, Ohio, and Brown's Run Country Club, Middletown, Ohio.

In Witness Whereof, the parties hereto have executed this Addendum to the Employment Contract in duplicate this 17th day of July, 1959.

Diebold, Incorporated, By Raymond Koontz, President. Warren Mosman.

Attest: Dwain A. Crawford, Secretary.

Executed in the presence of: Alexander J. Moody, Floyd M. Herold.

[fol. 577] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

AFFIDAVIT OF WALLACE SMITH—Filed March 1, 1961

COUNTY OF LUCAS,
State of Ohio, ss:

WALLACE SMITH, being duly sworn, deposes and says:

I am President of the Smith-Wheelock Corporation of 625 Southard Avenue, Toledo, Ohio. The company is known in the trade as "The American Bank Equipment Company" and some of our products are advertised under the trade name "American." I have been informed by attorneys in the Antitrust Division of the Department of Justice, who represent the Government in its suit against Diebold, Incorporated, and Herring-Hall-Marvin Safe Company, that my company has been described by Diebold and its attorneys as an important competitor of Diebold in the bank equipment field. I have been asked to describe my company and the place it has in the bank equipment market, and I believe I have done so as fully as possible in this affidavit.

I have been in the bank equipment business in various capacities for many years, starting in Boston in 1946 where I sold and serviced safes. In 1951 I became associated with the Foundation Safe Company of Toledo, Ohio, selling the products of Herring-Hall-Marvin at retail. I stayed with Foundation Safe until 1955 when I purchased the Pixley Safe Company of Toledo. Pixley had been established in 1869 and was at one time a major name in the safe business. By 1955, although the Pixley name was still well-known, the company was no longer an important factor in the field and I was able to purchase its name and equipment [fol. 578] for $10,000 inventory cost. Pixley is now a part of Smith-Wheelock, a corporation I organized in February 1959, and because of the advantage of selling under an established name in the bank equipment business, some of our sales of safes are still made through our Pixley division.

I began, in 1955, to recondition and sell used bank vault doors and safes. Prior to 1955, Pixley had sold new Mosler safes at retail, and I continued this part of the business, although not a "franchised" Mosler dealer. In addition, an important part of my business consisted of the installation, moving and servicing of bank equipment: up to the time Herring-Hall-Marvin was taken over by Diebold in September 1959, I did practically all Herring-Hall's installation and service work in the Toledo area.

From 1955 until the middle of 1958, my business was made up almost entirely of the reconditioning and sale of used bank vault doors and safes, installation and service work (mainly for Herring-Hall-Marvin), and the sale of new safes purchased from Mosler. One of my principal customers for rebuilt doors during that period of time was the Guardian Burglarproof Equipment Company of Cleveland, Ohio, a manufacturer of safe deposit boxes. However, in 1958 Diebold bought out Guardian and I lost an important customer and was forced to turn elsewhere to replace that business. I turned then to the manufacture of safe deposit boxes.

I believe it would normally take about three years for a new company to enter and establish itself in the business of making and selling safe deposit boxes. A great deal of manufacturing know-how goes into the building of the boxes and, of course, it takes time and great effort to break into a market that has for many years been dominated by only a very few manufacturers. I started production of safe deposit boxes in the Spring of 1958 and I was shipping boxes to customers by September of that same year.

When I began to make safe deposit boxes, a Diebold executive tried to persuade me to stay out of the box business. At that time there were only one or two other small companies engaged in manufacturing deposit boxes; the business was mainly in the hands of the three dominant bank equipment manufacturers: Diebold, Herring-Hall-Marvin and Mosler. The market for boxes and bank equipment in 1958 was experiencing great expansion. The Burroughs Clearing House publication which is attached to my affidavit points up the fact of the growing banking [fol. 579] business and the important consequence of that fact to makers of bank equipment. Burroughs points out,

for example, that in the summer of 1958 more than 2000 new bank and financial buildings were planned for the coming 36 months. I should point out that for some years safe deposit boxes have been a standardized product; that is, boxes made by Diebold had exactly the same dimensions as boxes made by Herring-Hall-Marvin or Mosler and a banker could go to any one of these manufacturers and get the same size box. Because of this important fact and because I saw an opportunity in the expanding bank equipment market to use my own specialized experience and the facilities of Pixley to good advantage, I was determined to produce safe deposit boxes, despite the efforts of Frank D. Robinson, an executive of Diebold, to persuade me to stay out of the box business. It was in July, 1958, when Robinson came to my office and offered to throw some Diebold installation and service work my way if I would agree to stop production of safe deposit boxes and to stay out of the market as a competitor of Diebold. Robinson told me that Diebold wanted to raise the price of safe deposit boxes, but that this would be difficult if a new competitor came into the business. I refused to agree to Robinson's proposal and went ahead with my plans. Since that time the manufacture and sale of safe deposit boxes has become a large part of my business; in 1958, our sales of boxes accounted for almost half of our gross sales.

At the time Diebold acquired Herring-Hall-Marvin, my company manufactured only two products; safe deposit boxes and tellers' lockers. During our fiscal year ending February 1, 1960, we sold about $100,000 worth of safe deposit boxes, or about 6500 openings at the rate of a little more than 500 a month. Sales of our lockers amounted to about $4000 for approximately 100 units during that same fiscal year. We also sold about $74,000 worth of reconditioned and "as is" used bank vault doors. Our safe installation and service work during that same year brought in about $22,000, and another $15,000 was made on installation of other bank equipment. Finally, through our Pixley division, we sold about $20,000 worth of new and used safes, averaging about two sales a month during the fiscal year ending February 1, 1960. My company's gross for that fiscal year amounted to a little more than $237,000.

[fol. 580] Smith-Wheelock is not a large company. Our total assets at January 31, 1960, were only about $157,000. We do not own the small building which houses the equipment I purchased from the old Pixley company. Smith-Wheelock today employs a total of 13 people, including Mrs. Smith, who is our bookkeeper, and myself. The installation crew is also included in the total of 13; two reconditioning men work only part-time; and I am the only salesman.

My company has tried to reach the bank equipment market throughout the United States; we advertise our company in publications with a nationwide circulation such as Burroughs. We do not think of ourselves as just a local company and we will attempt to fill any order we can get through the country. Admittedly, this has been difficult, however, with a one-man sales staff and limited funds for advertising. Aside from our limited capital and plant, however, there are two major obstacles to our expansion.

The first obstacle is the fact that the bank equipment business has been dominated for some years by the three big companies: Diebold, Herring-Hall-Marvin and Mosler. There are, in my opinion, several reasons for this situation. The officials of banks and other financial institutions have been traditionally conservative in their buying habits, and my experience in the business has shown me that they view any newcomer with suspicion. The names of the three big companies have been known to financial institutions for years; each of the names of the three goes back well into the last century, and bankers have known these names and their products for many years and today still prefer to deal with one or the other of the three major companies. Diebold, Herring-Hall-Marvin, in turn, have capitalized on this by constantly emphasizing in their advertising the fact that they have been in the business for many years. In addition, the three big companies constantly keep in contact with banks and other customers of bank equipment all over the country. Close personal relationships play the biggest part in getting sales from banks and each of the major companies have always had salesmen and representatives throughout the country in constant touch with their old customers and new banks in order to be on hand for remodeling or expansion plans or new building.

[fol. 581] It is obvious, from the size of my company, that we cannot afford to maintain salesmen throughout the coun-

try to be on top of potential orders. I rely almost entirely on the Dodge reports for news of new bank building and remodeling. And Smith-Wheelock can never hope to compensate for the di-advantage of being practically a new company. The main reason we still do business under the old Pixley name is because we recognize that it still has some value in a business where name means so much.

The second major obstacle Smith-Wheelock faces in the bank equipment business is the fact that we are not a full-line manufacturer. When a new bank is built, a great many items of bank equipment are usually needed. These items include the bank vault door, safe deposit boxes, perhaps vault linings for the vault, grille doors, teller's lockers and chests, sometimes vault ventilators or emergency escape doors, bank teller buses and undercounter equipment, night depositories, insulated ledger tray safes or other kinds of insulated record safes, and perhaps a fire resistive door for the protection of the bank's records. Many additional items could be mentioned, such as the bond boxes inside the Safe deposit boxes, and the keys that are used to guard the boxes; there also are many so-called accessories which go along with many of the items and which may not be strictly bank equnpment. For example, mirrors and decorations of one kind or another are used in equipping the bank vault.

In my experience, it has been the custom for a bank to outline its requirements for new equipment and to ask—either directly or through an architect or contractor—one or more of the companies in the field to submit a quotation for the entire package. The reasons for this are that the bank will usually get a better price on some of the items in the package if only one source of supply is used, and the bank will be saved the trouble of dealing with more than one seller. The trouble with this system, from the standpoint of my company, is that a manufacturer who does not have the full-line package has little chance of getting any of the new business unless he goes in with an exceptionally low price on the few items he can offer. As a matter of fact, Smith-Wheelock does not bid on some bank equipment jobs because we cannot afford to put up bond, which usually runs about 5% of the bid price.

[fol. 582] In the five years or so that I have been in the business, I have tried in different ways to overcome the obstacles in the way of making my company a stronger

competitor in the bank equipment field. As I previously stated, the only two products manufactured by my company prior to September 1959 were safe deposit boxes and tellers' lockers. These were items with which I could compete with the three major companies, although mainly in the remodeling market or where existing banks were building branch offices. My potential market has been made up of banks with no more than fifty to seventy million dollars of deposits, and I have not been able to break into the market for larger banks. To help fill out my product line, I also sold drive-up windows, night depositories, safes and money chests, which I purchased from Herring-Hall-Marvin, and a line of safes which I sold as a non-franchised Mosler dealer. Because I found it a serious disadvantage to be unable to offer new bank vault doors, I tried to manufacture my own door. In all the years since 1955, I have been able to produce only one bank vault door, which I sold in December 1960. It was not at all similar to those made by Diebold, Herring-Hall-Marvin or Mosler, but was instead an electrically operated sliding door. I also tried to bring into this country the bank vault door made by the Chubb Company of England.

I have never been a distributor for the Chubb door. I brought only one Chubb door into the United States and I sold it, not to a bank, but to Diebold. As far as I know, the only other Chubb door in the United States was installed in New England. The door I sold to Diebold was used for experimental purposes and then sold through Guardian to a bank in Columbus, Ohio. The Chubb door faces two disadvantages in the American market. First, the import duty is heavy, amounting to about 19% of the purchase price. Secondly, almost without exception, every bank vault door made in recent years in the United States is built with a standard "clear opening" dimension which in 78" x 32"; the clear opening on the Chubb's door is 75" x 31". The difference in this important dimension works to Chubb's disadvantage because often other bank equipment such as teller's buses which must be wheeled in and out of the bank vault are built to accommodate the standard American clear opening dimension.

My company is therefore still in the disadvantageous position of being unable to offer a new bank vault door. The reconditioned used doors which I have been selling since

[fol. 583] 1955 do not offer any significant competition to the doors made by Diebold, Herring-Hall-Marvin and Mosler. The small banks which have bought my doors have done so because simply they lack the money to buy one of the name doors, and for this reason they often do not even consider buying a name door. On occasion I have been able to sell a door to a bank which started on an expensive remodeling program only to exceed the budget. For example, about six months ago I sold a reconditioned bank vault door to a bank in Toledo which had already contracted to purchase a new Diebold door but exceeded the budget and had to settle for a reconditioned used door from my company. As far as larger banks are concerned, they usually can afford to buy the expensive, new doors made by Diebold, Herring-Hall and Mosler. I would also say, on the basis of my one experience, that the prospect of my company producing its own bank vault door in the future is doubtful, and as for my ever being able to turn out as many doors as Diebold or Mosler, that is just beyond possibility.

My efforts to round out my line more fully by purchasing the products of Herring-Hall were halted by Diebold's acquisition of that company. This was at a time when, according to Burroughs, (Exhibit H, attached hereto) one-third of the country's 23,000 bank and branches were planning new construction or modernization which would create a multi-million-dollar market for bank fixtures. Prior to the acquisition, as I have previously stated, I was able to purchase directly or through my dealers Herring-Hall's drive-up windows, night depositories, safes and money chests. Since that time I have attempted to make my own drive-up windows and night depositories and I have made one vault ventilator. When I could no longer obtain bond boxes for my safe deposit boxes, I tried at first to buy them from Liberty Sheet Metal Company of Hamilton, Ohio. But Liberty refused, in November 1959, to supply me with bond boxes and gave as its reason the fact that it had been supplying boxes to Mosler for forty-three years and that it would be unfair to Mosler to supply the same boxes to a new company. At present my bond boxes are made by a small company in Genoa, Ohio, which is using some of my manufacturing equipment for the job.

My company's lack of a full line of bank equipment has had a serious effect on my relations with my dealers. I

have been fortunate in having four or five dealer customers established in various sections of the country. There is one [fol. 584] in Detroit, one in Pittsburgh, one in Indianapolis, and another in Miami. I did have two others, in Dallas, Texas, and in Kansas City, but I lost both because I simply could not supply them with new doors and a full-line. My dealer in Miami, Lembit Vitsur, who does business under the name of "Florida Safe & Lock Company" has purchased about $2000 worth of safe deposit boxes from me. Vitsur himself is also a manufacturer; he makes drive-up windows and night depositories and he reconditions and sells two or three used bank vault doors each year. But, despite his small size, Diebold tried to buy Vitsur out because he offers some competition in the Miami area. Diebold also tried to buy out another of my dealers, Bill Wayco, in Detroit. Loss of these dealers would have a serious effect on my business.

As matters stand now, I do not believe that my company can be considered by any one who has any knowledge of the bank equipment industry to be an important competitor in that industry. The manufacture and sale of bank equipment in the United States today is dominated by two companies, Diebold and Mosler, which made the full line of bank equipment. The only product I make today which offers any competition at all to the giants of the industry is the safe deposit box, and my average monthly production of about 500-700 boxes is far below that of either Diebold or Mosler. The only other companies, so far as I know, which also make safe deposit boxes are Gross Fieble and Security Safedeposit Box Co. I have ben asked by the Government attorneys whether the situation I have just described is any different from the situation in the industry in September 1959, when Diebold acquired Herring-Hall-Marvin. My anwser is that, except for Herring-Hall's position at that time as an independent competitor, and, with Diebold and Mosler one of the three dominant firms in the bank equipment industry, the situation was no different.

Wallace A. Smith.

Subscribed and sworn to before me this 22 day of Feb. 1961.

Margaret Lasca, Notary Public.

My Commission Expires 3 27-61.

[fol. 585] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Depositions of Edwin G. Ziegler and Don W. Fitton—February 14, 1961

Depositions of Edwin G. Ziegler and Don W. Fitton, witnesses called on behalf of the plaintiff, pursuant to notice, copy of which was filed with the Clerk of the Court, and stipulations of counsel hereinafter set forth, at 738A Federal Building, Cincinnati, Ohio, between the hours of 10:00 o'clock A.M. and 4:45 o'clock P.M., Tuesday, February 14, 1961, before Edna Todd, a notary pubile in and for the State of Ohio.

[fol. 586] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice and Walter T. Nolte, Attorney, Department of Justice and Richard H. Pennington, Assistant United States Attorney.

For the Defendant Diebold, Incorporated: William L. McGovern, Esq. of Arnold, Fortas & Porter and Frederick A. Reister, Esq. of Milliken, Reister, Fitton & Latimer.

For the Defendant Herring-Hall-Marvin Safe Company: Murray S. Monroe, Esq. of Taft, Stettinius & Hollister.

[fol. 587] COLLOQUY BETWEEN COUNSEL

Mr. Toohey: Gentlemen, are you willing to have the usual stipulations about waiving any objections to the time, place and notice of taking of the deposition, qualifications of the Reporter, and allowing the witness to sign the transcript before any notary public?

Mr. Monroe: It's all right with me.

Mr. McGovern: I am agreeable, Mr. Toohey, except that I would like the record to show that the subpoena of Mr. Thomas and Mr. Ziegler was issued on the 6th of February and was served on the 6th of February. We have the subpoena if you have any doubt about that.

Mr. Toohey: Well, let me put the stipulations into the record and subject to any corrections you want to make.

It is understood that this deposition may be taken in accordance with the Federal Rules of Civil Procedure except insofar as the following stipulations may apply.

It is hereby stipulated and agreed by and between the attorneys for the respective parties that all objections to the taking of the deposition of Mr. Ziegler on the grounds of the qualifications of the officer taking the deposition and of the time, place and notice of the taking of the deposition are hereby waived.

It is further stipulated and agreed that the witness may [fol. 588] sign the transcript of his testimony after having examined the same, in accordance with Rule 30(e) of the Federal Rules of Civil Procedure before any notary public of the State of Ohio.

It is further stipulated that the prompt filing of the transcript required by Rule 30(f)(1) of the Federal Rules is hereby waived, and that the attorneys for the respective parties may agree to corrections of the transcript at any time prior to submission to the Court, as corrected, and the witnesses and attorneys for the respective parties may agree to such corrections.

Do you have any objections to those stipulations, Mr. McGovern?

Mr. McGovern: It is agreeable with me, with the exception I mentioned earlier, that I would like the record to reflect the fact that the subpoena for the witnesses was issued on February 6 and served on February 6.

Mr. Toohey: So the record may be complete, the notice of the taking of these depositions was mailed to attorneys for the respective parties on February 3, 1961.

Mr. McGovern: And received by this attorney, at least, on February 6.

May I say, off the record, please.

(Off the record.)

Mr. Toohey: Will you swear the witness?

[fol. 589] EDWIN G. ZIEGLER, a witness of lawful age, being first sworn in the above cause, testified on his oath as follows:

Direct examination.

By Mr. Toohey:

Q. Mr. Ziegler, you were served with a subpoena asking for the production of documents at this time?

A. That's right.

Q. And you are a Vice President?

A. Vice President and Cashier.

Q. For the First National Bank and Trust Company of Hamilton, Ohio?

A. That's right.

Q. Do you have those documents with you today?

A. I have brought some records, available records, with me.

Mr. Toohey: Let me read for the record the request that was made in the attachment to the subpoena duces tecum served on Mr. Ziegler.

It reads: "All books, documents, and other tangible things that contain information relating to all accounts, deposits, loans, borrowings, or loan or credit arrangements [fol. 590] of Herring-Hall-Marvin Safe Company, Hamilton, Ohio, during the period of time from June 30, 1956, through September 11, 1959.

Q. Do you have the documents requested by that subpoena attachment, Mr. Ziegler?

A. I have the documents from '58 to '59 as to deposits and checks, but prior documents, they are on films. It meant that we would have to take negatives off at this time and didn't have the required time to get photographs off of our films on statements prior to '58.

Q. Let me see if I understand.

Mr. McGovern: May I interrupt at this point, Mr. Nolte, to read into the transcript a motion and order on that motion entered by the Court yesterday with respect to the scope of this examination today. At page four of the transcript for February 13, 1961, Mr. McGovern orally moved

the Court "under Rule 30 to limit and confine the deposition of the officers of the First National Bank of Hamilton to the activities of the bank in connection with Herring-Hall-Marvin Safe Company during the first nine months of 1939. 1959." I beg your pardon, 1959. "Without prejudice depending upon what is shown, to come back to the [fol. 591] Court and ask for permission to go into some other period."

The Court granted that application. I assume, therefore, that the examination today will, at least In initio, be confined to the first nine months of 1959.

Mr. Toohey: To save time, I am stating this for the record to you, Mr. McGovern, to save the time of the witnesses and the Reporter, we are going to limit our examination to that period beginning January 1, 1959, through September 11, 1959.

However, I wish to state for the record that we do not concede that was a proper motion on the part of Mr. McGovern, and I refer now to the motion he just read from the record transcript of February 13, 1961.

I may add there was no notice given, and we feel technically that motion was improperly made. However, as I said, to save time we will confine ourselves to examination during the period January 1, '59, through September 11, '59, without relinquishing any rights we may have to go back.

Mr. McGovern: Let the record show also, will you, please, that yesterday's hearing before the Court was a rather extraordinary hearing in all particulars.

[fol. 592] Counsel for Diebold turned up in support of a motion that was pending before the Court. Counsel for the Government did not show at all, even though no motion had been made and no motion to this moment has been made for a postponement of the hearing on that motion for summary judgment yesterday.

In court, however, supported only by an affidavit, the District Attorney, Mr. Pennington, made an oral application to the Court for a postponement, and it was in exchange for his oral application that I then made an oral application to confine the scope of this deposition.

May I also add that until I came into Court yesterday, Mr. Toohey, I had no notice of your affidavit to support the affidavit of postponement.

Mr. Toohey: Not to argue the point, Mr. McGovern, I would like to state for the record that the Government was represented at the hearing on February 13, 1961, by Mr. Pennington, Assistant U. S. Attorney here in Cincinnati.

Mr. McGovern: May I interject?

Mr. Toohey: I would like to finish, Mr. McGovern. I would like to add that the attorneys besides Mr. Pennington representing the Government in this case did not [fol. 593] appear at the February 13th hearing for the reason that Mr. Pennington apprised us by telephone during the preceding week that he had talked to Judge Druffel and the Judge had indicated that he would grant the Government the time it was applying for.

Secondly, just so the record may be clear, it was not a motion which the Government filed on February 13th. It was an affidavit filed under Rule 56(f) of the Federal Rules of Civil Procedure.

Q. Mr. Ziegler——

A. Make it Ziegler. It sounds better.

Q. Will you state again the records which you have brought with you?

A. I have the available records from April '58 to the closing of the account which is on December 31, '59.

Q. Mr. Ziegler, we'll ask you, too, if you can with convenience, produce to us those documents relating to the period beginning January 1, 1959, through September 11, 1959.

A. Is that including September 11th?

Mr. Toohey: We will include it unless Mr. McGovern objects.

[fol. 594] A. (Witness handing documents to Mr. Toohey.)

Q. Mr. Ziegler, are these the originals of these statements of account?

A. These are the originals of the statements of account that are in the bank files.

Q. These are not copies?

A. These are not copies, no, sir.

Mr. Toohey: I think, as a matter of courtesy, perhaps we could undertake to stipulate as to the marking of these, if you have no objection, Mr. McGovern.

Mr. McGovern: I have no objection at all, Mr. Toohey. In an effort to further expedite this proceeding, in view of the Court's indication that he would like us to be back in there tomorrow morning, the 15th—What is tomorrow—the 15th at 11:00 o'clock, I am prepared to try to shorten this record by undertaking this stipulation with you in the presence of your witness, if he will so state that if we were to examine each and every one of those balance sheets they would reflect the fact that at no time during that nine month period did the bank ever return a check of Herring-Hall-Marvin marked no funds, if the witness will so state. [fol. 595] Mr. Toohey: Let me see if I understand that fully, Mr. McGovern. Would that mean that if the witness so stated, we could understand him to mean that at no time during that period was Herring-Hall-Marvin overdrawn on its accounts as shown by the statements of record of the bank, during the period of January 1, 1959, through September 11, 1959?

Mr. McGovern: Yes. And just to be absolutely clear, Mr. Toohey, not to bandy words, overdrawn in the sense that none of those bank statements, if the witness will so testify, at any time during the nine months of '59 show a red figure for the existing and current bank balance of Herring-Hall-Marvin on the records of the bank.

Off the record for a minute.

(Off the record.)

[fol. 596] Q. Mr. Ziegler, will you describe precisely what these documents are, what they purport to be?

A. Well, the documents dating from December 31st to the closing of the account, which is on September the—well, up to September 14th, show a listing of all charges we charged against the account. It shows a listing of all deposits made and also the balance at the end of the day.

Q. And these sheets are called by the bank in its business what?

A. Ledger sheets.

Q. Ledger sheets.

A. (Nodding.)

Mr. Toohey: Now, it has been agreed among counsel, for the convenience of the witness, the bank and the parties, these ledger sheets for the period beginning January 1,

1959 through September 11, 1959 will be marked for identification Plaintiff's Exhibits—I don't know how many pieces of paper there are.

The Witness: I don't either.

Mr. McGovern: Let's make it blank to blank.

Mr. Tohey: All right. Can you leave blanks there, Mr. Reporter, and we will fill the numbers in at a later time—or Mr. Ziegler can do that.

[fol. 597] The Witness: Uh-huh.

(Thereupon, the ledger sheets dated January 1, 1959 through September 11, 1959 of the First National Bank and Trust Company relating to the account of Herring-Hall-Marvin Safe Company, were marked Plaintiff's Exhibits Nos. A-1 to A-153 inclusive, for identification.)

Mr. Toohey: Mr. McGovern, do you want to offer your stipulation as to what these documents——

Mr. McGovern: Yes. May I just ask one qualifying question?

When you used the descriptive term "ledger sheets," Mr. Ziegler, does that term—Is that synonymous with the term that the customer of the bank uses when he refers to his bank statement? Are those the statements?

The Witness: That's one and the same in our terminology, "ledger sheets." In his terminology it's a "statement."

Mr. McGovern: In other words, those so-called ledger sheets in your files would be exactly the same as the bank statements which the company has in its files?

The Witness: That's right.

Mr. Nolte: Let me interrupt just a moment. Can we get [fol. 598] more precisely what account of H-H-M this account represents?

The Witness: They are regular, general accounts.

Mr. Nolte: Did they have other accounts?

The Witness: A payroll account.

Mr. Nolte: More than one?

The Witness: No.

Mr. Nolte: Any other account?

The Witness: No.

Mr. Nolte: This is the general—

The Witness: This is the general operating account.

Mr. Nolte: Do you call this a commercial account?

The Witness: This is a commercial account.

Mr. Nolte: All right. Excuse me.

Mr. McGovern: Yes. Pardon me just a moment (examining papers).

To be sure we are clear about our terminology, Mr. Ziegler; in other words, what you describe as a ledger sheet is the same thing as the company's records reflect as a "statement"?

The Witness: That's right.

Mr. McGovern: Then, Mr. Toohey, I am prepared to [fol. 599] stipulate on behalf of Diebold that if Mr. Ziegler will so testify from his examination of those ledger sheets, that at no time during the year 1959 do those ledger sheets reflect that the bank ever rejected or protested a Herring-Hall-Marvin Safe Company check because there were inadequate funds to cover it, I will stipulate that is the fact.

Mr. Monroe: You said for the year 1959?

Mr. McGovern: For the year 1959.

Mr. Reister: No.

Mr. McGovern: I beg your pardon. For the first nine months of 1959.

Mr. Toohey: Can we understand by that, Mr. McGovern, that by the same token these records will show—Mr. Ziegler can so testify—will show no overdrafts on the commercial account of Herring-Hall-Marvin at the First National Bank and Trust of Hamilton, Ohio, from January 1, 1959 through September 11, 1959?

Mr. McGovern: That's agreeable to me if Mr. Ziegler will so testify.

The Witness: That's correct; no overdrafts.

Q. Can you so testify, both as to Mr. McGovern's statement——

[fol. 600] A. Well, we never had an overdraft. We never protested any items, never returned a check to the payee.

Q. All right. And in answer to mine, the ledger sheets do not show that at any time during the period January 1, 1959 through September 11, 1959 the commercial account of Herring-Hall-Marvin at your bank was overdrawn?

A. Never overdrawn.

Q. Thank you, Mr. Ziegler.

Mr. McGovern: May I just ask, Mr. Toohey, is counsel for Herring-Hall-Marvin agreeable to that—or Mosman Industries? I beg your pardon.

Mr. Monroe: Yes. That's satisfactory.

Mr. McGovern: All right.

Mr. Toohey: I think it's also been indicated that it can be stipulated among counsel for the parties that these documents which have been marked for identification were made in the regular recourse of business and sent in the regular course of business to Herring-Hall-Marvin and that all objections to the authenticity, genuineness, of these documents are waived; and I understand Mr. McGovern will have not only his rights as to relevancy and materiality, but possibly a further check on the authenticity?

Mr. McGovern: Yes, I am agreeable to that suggestion, [fol. 601]Mr. Tooey, with the principal exception of reserving the right to check against our own statements. I assume from Mr. Ziegler's testimony that these ledger sheets are identical with our statements, but I would like to reserve the right to check.

Mr. Toohey: Yes.

Q. Mr. Ziegler, I understand that you have similar ledger statements for a period prior to January 1, 1959 with you; is that true?

A. That's right, from April 30th, '58.

Q. From April 30th, 1958 to January 1, 1959 in addition to those——

A. Uh-huh.

Q. —documents we have had marked. You mentioned earlier that you have microfilmed copies or reproductions of other records and documents——

A. That's right.

Q. —relating to the subpoena duces tecum. Will you describe the names of those documents?

A. Well, they are the ledger sheets, same as this prior to '58.

Q. Prior to April of '58?

A. That's right.

Q. Are there any other kinds of documents that come [fol. 602] within the subpoena?

A. Well, I have the loan copies, loan sheets.

Q. Let me clear one more question, Mr. Ziegler. You

have been asked this. Am I correct in understanding that these ledger statements are the only bank records, aside from those relating to the credit matters, that reflect Herring-Hall's accounts, commercial accounts or accounts of any kind, with the First National Bank and Trust?

A. That's right.

Mr. Monroe: Would you read that question and answer back to me?

(Last question and answer read by the reporter.)

Mr. Monroe: Let me ask Mr. Ziegler a question off the record.

(Discussion off the record.)

Mr. Toohey: Well, we will go back on the record.

Q. Mr. Ziegler, do you want to correct your answer in any way to my question?

A. Well, it should include then that we have microfilmed checks of H-H-M Safe Company.

Q. And for what period do you have those microfilmed?

A. For the same period as the statements and ledger [fol. 603] sheets show.

Q. That period again is?

A. Well, I have them here from April 30th, '58 to the closing of the account, which was December—I think it was December 31st, '59.

Mr. Monroe: I think we ought to put something else in the record here so there is no misunderstanding.

Also there is a pension trust in their trust department which, as I understand it, involved Herring-Hall-Marvin during this period. Is that correct?

The Witness: That's true.

Mr. Monroe: I presume they would have some records on that, although I don't think they are relevant to this inquiry at all.

[fol. 604] Q. Mr. Ziegler, then you have no records—Mr. Ziegler, then am I correct in understanding you have no records which would come within the supoena served you prior to April 1958?

A. Outside of loans, loan sheets would show prior to 1958.

Q. Would you explain for the record why you do not have or the bank doesn't have such records?

A. Because all of our ledger sheets are filmed after a year. After we hold them for a year, we photograph all of our ledger sheets and then destroy them.

Q. Have you still got microfilm reproductions?

A. We have films of all the years prior to this.

Q. Do you have microfilm reproductions for all the years covered by the subpoena served you?

A. No, not the mocrofilm reproductions. What I did bring down is the balances taken off of these microfilms from '56 at the end of each month.

Mr. Monroe: You have a copy of the subpoena?

Mr. Toohey: Do you want the attachment? Do you have one?

Mr. McGovern: No. May I have one?

Q. Mr. Ziegler, the bank does have records going back of April 1959 which would come within the subpoena except [fol. 605] that they are microfilmed reproductions?

A. They are microfilm.

Q. And not the originals?

A. Not the originals.

Q. Which have been destroyed?

A. That's right.

Q. The destruction is, I take it, part of a normal——

A. Bank procedure.

Q. —routine destruction of records?

Mr. Monroe: I don't want to be captious but I think that should be April 1958.

A. April '58, yes.

Q. To pin down the date at which you now have records of Herring-Hall, how far back do you have records microfilmed or otherwise?

A. In what category?

Q. In the——

A. Commercial deposits or commercial accounts? This document of our loan records are not photographed. These are.

Q. Let us take these ledger statements. How far back do you have the microfilmed reproductions?

A. Since we began the microfilm, January in 1930.

[fol. 606] Q. Mr. Ziegler, were you told by Mr. Fille, who was, I take it, Vice President and now Acting President of the First National Bank——

A. He is not Acting President. He is still a Vice President, Executive Vice President.

Mr. Fitton: I am the President.

Q. Were you told that the Government had telephoned Mr. Fille, the Government Attorney had phoned Mr. Fille?

A. Oh, I just don't remember.

Q. Let me ask you, Mr. Ziegler, when did you begin your collections of documents?

A. After I got the subpoena.

Q. After you got the subpoena. There was no attempt on the part of the bank before service of the subpoena to collect the records requested by the subpoena?

A. No.

Q. I have asked you whether you had records, microfilmed reproduction or otherwise, of ledger statements going back of April 1958 and your answer was yes, you had them?

A. We have that.

Q. Back at least through June 30, 1956?

A. That's right.

Q. Do you have any other originals or reproductions [fol. 607] of other accounts of Herring-Hall?

A. There might have been a dividend account once upon a time that we might have.

Q. That would be separate?

A. This would be separate.

Q. From the ledger statements?

A. Yes. The payroll, which was secondary to this, and we might have had a dividend account, too.

Q. Do I understand you to say that the bank had or kept separately the payroll account of Herring-Hall-Marvin?

A. That's right.

Q. That was kept separately from these ledger statements?

A. From the general ledger statements.

Q. Was there just one payroll account?

A. Well, when you say one, whether it is one continuous payroll account?

Q. Was it subdivided into any categories?

A. No.

Q. It was headed payroll account?

A. Payroll account.

Q. It was not called special or regular?

A. No.

Q. And you have the records relating to those accounts?

[fol. 608] A. That's right.

Q. But you haven't brought them with you here today?

A. I didn't bring the payroll accounts.

Q. Let me ask you just for the record, was that on the advice of your attorney, Mr. Ziegler?

A. No. I could have brought them along but it was a transfer from this account to the payroll account. The payroll check came in and consumed the amount deposited so it is a matter of an in-and-out program. Then this is the general operation of Herring-Hall-Marvin Safe.

Q. Do I understand then that these woud reflect any amount, that is these ledger statements would reflect any amounts held at the same time in the payroll account?

A. That would be transferred out of here to the payroll account. Then that week would be consumed by the payroll checks that were paid.

Q. Do you have the originals or copies of the payroll accounts back through December 30th?

A. That's right.

Q. You have the originals?

A. Uh-huh.

Q. Back through June 30, 1956?

[fol. 609] A. Not the originals, no. We have the originals back to this point, but the rest would be on microfilm.

Q. Besides the payroll accounts, were there any other accounts of that kind that Herring-Hall had with the First National Bank?

A. I think there was a divided account once upon a time. I don't remember just how far back that went.

Q. Any other kind of accounts such as a Credit Union account?

A. Herring-Hall had a Credit Union but I don't think it went under the name of Herring-Hall. I think they had a Credit Union account but it was under some other name, I think.

Q. Were the funds kept in the First National?

A. I think so. I'm not sure.

Q. Would you have records which would indicate that?

A. If we had the account, we would have records.

Q. I would suggest to you, Mr. Ziegler, that such records would come under the subpoena.

Mr. Monroe: I would like to make a statement for the record. This Credit Union is a separate corporation. It is not owned or controlled by Herring-Hall-Marvin and/or Mosman Industries.

Q. Do you have other documents with you, Mr. Ziegler, [fol. 610] relating to a credit arrangement?

A. We have the ledger sheets showing the loans we made to Herring-Hall-Marvin Safe.

Q. For what period?

A. These records go back to 1951.

Q. Those records are complete from 1951 through?

A. 1951 on through.

Mr. Toohey: May we have those marked for identification. There are only four or five of them, Mr. McGovern.

The Witness: Three, three sheets.

Mr. McGovern: In view of the voluminous number and the way they are kept, I would have no objection to having the entire group of sheets marked for identification, provided it is understood the examination of this witness be confined to the first nine months of 1959.

Mr. Toohey: We'll go along with you on the stipulation, Mr. McGovern, saving, of course, our rights for further examination pending hearing tomorrow.

(Thereupon, the liability ledger sheets dated from 1951 through September 16, 1959, of the First National Bank and Trust Company, relating to the account of Herring-Hall-Marvin Safe Company, were marked Plaintiff's Ex-[fol. 611] hibits to , inclusive, for identification.)

Q. Will you, Mr. Zieger, describe for the record the titles of those sheets?

A. This is the Herring-Hall-Marvin Safe Company liability ledger sheet. Of course, they date from—our records dated here from '51 to the close of the record which is September 16, 1959, which shows all loans made and all loans paid by Herring-Hall-Marvin Safe Company.

Q. Do you know whether there are any others?

A. This is all.

Q. This is all. Do you have reproductions of those in any form?

A. No.

Q. Those are the only records?

A. These are the only documents we have on loans, yes.

Q. Mr. Ziegler, may I ask you whether you would be willing to have those three sheets which have been marked as Plaintiff's Exhibits reproduced for us?

A. Yes.

Q. And just as soon as possible.

Mr. Toohey: Mr. McGovern, may I ask whether you are willing to accept the reproductions that will be made of these [fol. 612] documents as though they were the originals and stipulate to their authenticity and the fact that they were made in the regular course of business?

Mr. McGovern: We are agreeable that photostatic copies be substituted for the originals to be used as fully as though the originals were in the transcript.

Mr. Toohey: How about you?

Mr. Monroe: Yes.

Q. Mr. Ziegler, were there any other kinds of documents which related to the loans which are contained on these statements, that is any kind of an agreement or—

A. You mean—well, go ahead.

Q. —some form the bank might have had Herring-Hall fill out at the time these sheets or any of them were made?

A. Well, a financial statement which we required.

Q. From Herring-Hall?

A. From Herring-Hall.

Q. What was the nature of that statement?

A. What was the nature?

Q. Yes.

A. It is an audited statement from their auditors.

Q. Their own internal company auditors?

[fol. 613] A. No, I don't think so. I think it was an outside auditor.

Q. An outside firm?

A. Uh-huh.

Q. If I suggest to you it was Lybrand; would that ring a bell?

A. What's that?

Q. Do you know the name of the outside firm?

A. No, I don't, not at this time, because we destroyed those records also. Since we had no more dealings with Herring-Hall, we cleaned our files and destroyed those records.

Q. And you have no microfilm reproductions of those?

A. Not of the statements, no, the financial statements that Herring-Hall offered us.

Q. Just for the record, can you say when those statements submitted in connection with the loans reflected on Plaintiff's Exhibit were destroyed?

A. Oh, offhand, about two or three months ago, I guess.

Q. Two or three months ago?

A. Uh-huh.

Q. November 1959?

[fol. 614] A. Probably somewhere around there. We cleaned out our files.

Mr. Nolte: 1961.

Q. Excuse me. November 1960?

A. That's right.

Q. What was the occasion of this? Was this a normal——

A. A normal cleaning of our credit files and destroying all records that had no bearing on the loans we might have made or probably were soon to be in the future.

Q. But the bank kept these?

A. Those are ledger records, yes.

Q. Is there any reason, pust to satisfy my curiosity, why the records here should be kept and not the statements submitted to support the loans?

A. This shows the loans we have made to Herring-Hall, but the credit files we have to have a new credit information if we intend to make a new loan.

Mr. Toohey: Do you want to take a recess?

(Recess taken.)

[fol. 615] Mr. Toohey: I gues we are back on the record.

Q. Mr. Ziegler, are you willing on behalf of the bank to produce to us those records of payrolls accounts, checks and

other items which it now develops are available, from the subpoena? You are willing to produce those?

A. Now, wait a minute. What did you say again?

Q. You mentioned earlier—

A. I can produce payroll documents similar to these, but not checks.

Q. Not checks?

A. They are photographs. They are in the hands of the Herring-Hall-Marvin people. We send them back to them, the checks.

Q. You don't have the originals?

A. Not the original checks; no, sir.

Q. Now, as to that material which is not in original form because the originals have been destroyed, now in microfilmed reproductions, have you started to——

A. No.

Q. —reproduce——

A. No.

Q. You have not?

A. No.

Q. Is there any reason for that, Mr. Ziegler?

[fol. 616] A. Well, it would take nine months of work here. That means individual sheets; that means individual photographs. That means it would tie up our machine for days upon days to get this stuff in order, plus the time and a girl to do it; and we just don't have that time and the employees right now, at the present time, although we could probably work around to it.

Q. Well, do I understand you are willing to produce those?

A. Oh, we are willing. If the Court says it wants them, we are willing to produce them; but we don't want to go ahead and spend days and days on documents that will probably never be used. But if you want them, they can produce them. They are available. They are on film.

Q. Just as a technical matter, I am not sure I understand you. Are you refusing to produce them——

A. Not refusing, no. We will produce them. If the Court says they want them, we will produce them. But I was wondering about the costs involved in producing them; that's the whole thing.

Q. Well, Mr. Ziegler, there has been no objection made

by anyone to the production of documents from January 1 1959 through September 11 to us. I assume that perhaps some of those have been microfilmed; that would be the [fol. 617] payroll accounts or checks?

A. They are in this form (indicating) right now from January '59.

Q. But the checks are in microfilm form?

A. The checks are being microfilmed on a daily basis. So that means we will have to take out every day and film each one, show each one on a screen and take a picture of it.

Q. I see. Well then, your decision not to produce to us the early originals of these ledger statements and payroll account statements, which are now only in microfilm form, is not—Well, it's due simply to the fact that you didn't want to spend the money and time on it; is that right?

A. Well, right at this point, February 6th to now, we just didn't have time to produce them.

Q. And you haven't started either?

A. I haven't started either.

Q. But you are willing to do it?

A. If you decide or if the Court decides they want them and we have to do it, we will do it.

Q. Are you now referring in that sense— —

A. I don't know who has jurisdiction; I mean you or the Court. I mean I don't know what program we are working under.

[fol. 618] Q. Well, I guess we will leave it at that.

Mr. McGovern: I wonder, Mr. Toohey, whether or not under the subpoena the bank is merely obligated to produce the microfilm and not the blown-up reproductions, for your benefit. The only record the bank has, if I understand Mr. Ziegler's testimony, is now microfilm.

Mr. Toohey: That's right.

Mr. McGovern: So, technically, under the subpoena he would be required to produce only the microfilm, which you could then blow up or not, as you saw fit.

Now, let me for the record suggest again, in order to expedite and to economize both in terms of time and money, that we in the files of Herring-Hall-Marvin Safe Company have the originals of the checks. I have in fact a vast number of them here today, but I couldn't possibly produce them all, but we have the originals of those checks.

If the Government is anxious to see the checks, I now renew the offer I made last week to make the originals of the checks available to you.

Mr. Toohey: Let me ask you this one question, Mr. McGovern: Are you saying that you have all the checks?

[fol. 619] Mr. McGovern: We have all the checks available, yes.

Mr. Toohey: You think you have all the checks the bank would have?

Mr. Frank Robinson: The bank doesn't have the checks.

Mr. Toohey: Of which the bank has copies?

Mr. McGovern: You understand, Mr. Toohey, that when a check comes in, for example, dated July 21, 1958, the bank microfilms it and sends the check to us. We have got the original check.

Mr. Toohey: Yes. I just want to make sure, if we accept your offer, Mr. McGovern, that we would be able to get all the checks, if that were necessary of which the bank has microfilmed reproductions.

Mr. McGovern: Right. And I suggest to you, Mr. Toohey, that that is infinitely more convenient for all of us because microfilm is hard to use, just hard to use. The original of the check is a much more convenient device for analysis and examination.

Mr. Don W. Fitton: You see, Mr. Toohey, in our filming, all of the checks that go through the bank each day are all on one film. We have to go through and pick out a Herring-

[fol. 620] Hall check, go through 75 more checks, pick out another Herring-Hall. The film is available to your office if you want to come up there and work on them. The originals would be much easier.

Mr. Toohey: There is only one other question. I have asked you whether they are all complete. How far back do they go? What period of time do those checks go back to?

Mr. McGovern: I should like Mr. Robinson to answer that question.

Mr. Frank Robinson: To the best of my knowledge, they go back to '56, the period of your subpoena.

Mr. Toohey: At least June 30, 1956, to September 11th, 1959?

Mr. Robinson: Yes.

Mr. Monroe: Let me make one other suggestion. If you have got any question about the completeness of these checks, you can check these checks against the ledger sheets and if there is any question, you can ask the bank to produce the missing check. You have got a complete cross-reference.

Mr. Toohey: Sure.

[fol. 621] Mr. Don W. Fitton: This card would show the transfer each week of each payroll check over to the payroll account.

The Witness: Right.

Q. Mr. Ziegler, may I go back once more to those last documents which were marked as Plaintiff's Exhibit blank, these three sheets, and ask you to look at that sheet which reflects loans made by the First National to Herring-Hall during the period December 28, 1958——

Mr. McGovern: December 30th, I think.

Q. —December 30th, 1958 through September 11, 1959; and when you find those on that sheet, Mr. Ziegler, will you recite for the record what that sheet reflects regarding such loans?

A. Well, on December the 30th, '58 we had three individual notes, two $100,000 and a $50,000 loan. That made a total of $250,000. That's a demand loan.

And on May the 6th, '59 there was an additional loan of $25—two $25,000 loans were made on May the 6th, '59, which made a total of $300,000.

Then on May the 13th, there was two $25,000 loans were repaid, brought the loan down to $250,000.

Then on May—on September 11th, '59, there was $50,000 reborrowed, bringing the total loan up to $300,000.

[fol. 622] Then on September 16th the entire loan of two $100,000 loans, plus the $50,000 notes, were paid off.

Q. Mr. Ziegler, if I remember your testimony just now, you said these loans made earlier in the year were demand——

A. Demand loans.

Q. Is that fact reflected in that document?

A. They are classified in the column here as demand.

There's two types of loans that we have, time and demand.

Q. Is the word "demand" used?

A. "Demand" is the category in which we classify these notes. Another column shows the time loans.

Mr. Toohey: I have no further questions of Mr. Ziegler.

Cross-examination.

By Mr. McGovern:

Q. Mr. Ziegler, let us refer just briefly to that listing of loans that you just described for the record. I understood you to say, sir, that on May 6th, 1959 two notes, each in the amount of $25,000—demand notes, each in the amount of $25,000—were negotiated, bringing the total outstanding loan commitment at that time to $300,000?

A. That is correct.

Q. May I ask you, sir, under the law what was your limit in terms of a loan to any single customer?

[fol. 623] A. Three hundred thousand.

Q. So that on May 6th Herring-Hall-Marvin Safe Company had borrowed the limit it could from your bank?

A. That's right.

Q. Then coming down to September 11th, 1959, I understood you to say that Herring-Hall-Marvin again borrowed an additional $50,000, having paid off one 50 in the meantime?

A. That's right.

Q. So that on September 11th, 1959 the Herring-Hall-Marvin Safe Company had a demand loan commitment from you—a demand loan obligation to you in the total amount of $300,000?

A. That's right.

Q. And that again was the limit——

A. Limit.

Q. —of their ability to borrow from your bank?

A. That's right.

Q. Do you happen to know, sir, who paid off that $300,000 note on September 16th, 1959?

A. The 300,000? I don't know. Personally, I don't know. I have forgotten just what the procedure was at that time.

Mr. Don W. Fitton: I could answer, but I am not on the witnes stand.

A. (Continued.) The record here shows paid off. I [fol. 624] don't have the transaction.

Mr. Don W. Fitton: Diebold assumed all their obligation and they paid off.

Q. Mr. Ziegler, I would like to draw your attention just briefly to a report of certain accounts and records of the Herring-Hall-Marvin Safe Company, prepared by Lybrand, Ross Brothers & Montgomery, certified public accountants, dated December 8th, 1960, which is presently a document of record in this lawsuit as an exhibit to Diebold's Motion for Summary Judgment; and I should like to direct your attention, sir, to the payroll account figures shown on the payroll account in terms of reimbursement of the general account, and then show you, sir, a statement from the First National Bank of the payroll account, and ask you whether or not the items shown on the Lybrand-Ross statement in terms of reimbursement exactly duplicates the reimbursements deposits shown on the payroll statement?

A. Yes. These payroll—I mean deposits made to the payroll account coincide with the records that they show here of the reimbursements of payroll accounts.

Q. And coming down, let us say, to the second week in May, the week of May 8, Mr. Ziegler, let me show you a check which purports to be to the order of the payroll account in the amount of $8,277.65. That is the same item shown for May 8th——

[fol. 625] A. That's right.

Q. —by the Lybrand report.

A. By the report here.

Q. I show you a check dated May 8th to the order of the payroll account in the amount of $10,000, and that I suggest to you is the item shown——

A. Yes, that's right.

Q. Another item in the amount of $10,000 to reimburse the payroll account in the general account?

A. May 12th.

Q. And a third item in the amount of $10,000?

A. That's right.

Mr. Toohey: Mr. McGovern, may we have those marked as exhibits?

Mr. McGovern: If you would, please.
Off the record for a second.

(Discussion off the record.)

[fol. 626] Mr. McGovern: Would you mark these four statements from the First National Bank and Trust Company of Hamilton designated the payroll statements of the Herring-Hall-Marvin Safe Company as Diebold, D Exhibit —how will we say it—for identification D 1, 2 , 3, 4, 5.

(Thereupon, the four statements from the First National Bank and Trust Company of Hamilton designated the payroll statements of the Herring-Hall-Marvin Safe Company, were marked Defendant Diebold's Exhibits Nos. D 1 to D 5, inclusive, for identification.)

Mr. Toohey: Were these things written on by the bank?
The Witness: I don't know.
Mr. Toohey: Can we note that those handwritten dates on the exhibits were not put on by the First National?
The Witness: That is the closing date of the statement apparently.
Mr. McGovern: Can we just have five minutes while I get these in order?
Mr. Toohey: Certainly.
Mr. McGovern: I would like to have these marked for identification D-6 through 28.

[fol. 627] (Thereupon, various checks of the First National Bank and Trust Company on the account of Herring-Hall-Marvin Safe Company, were marked Defendant Diebold's Exhibits Nos. D 6 to D 28, inclusive, for identification.)

Mr. McGovern: Could I have this statement of the payroll account for the period May 1, 1959, marked D 1-A.

(Thereupon, the statement of the payroll account of the Herring-Hall-Marvin Safe Company, for the period May 1, 1959, was marked Defendant Diebold's Exhibit No. D 1-A for identification.)

Mr. Toohey: Note again for the record that the handwritten date appearing on D 1-A was not put there by the bank.
Mr. McGovern: All right.

Q. Mr. Ziegler, coming back to the question I asked you a moment ago concerning the so-called reimbursement checks during the week of May 8 to 13, which purported to be checks on the general account for reimbursement of the payroll account, do you remember that you stated that there were in fact four checks in the amount of $8,277.63, $10,000, $10,000, and $10,000?

Mr. Toohey: Excuse me, Mr. McGovern. Could we read off the identification?

[fol. 628] Mr. McGovern: Yes, I am going to.

Q. Making a total of $38,000, as reflected on Exhibits D 12, D 13, D 14, and D 15. Now, I should like to ask you, Mr. Ziegler, whether or not the date on all four of those checks is not the same?

A. That is correct.

Q. What is that date?

A. May 8, '59.

Q. Now, sir, can you tell us by examining the cancellation on each of those checks when in fact the check was cancelled by the bank?

A. The first check of $8,277.63 was cancelled on May 8, '59. The second check was cancelled, the $10,000, was cancelled May 11, '59; and the third check of 10,000 was May 12, '59; and this is May 13, '59. It is over that several times. I guess it is May 15 or 13.

Q. May 13.

A. Yes, May 13, 1959.

Mr. McGovern: Off the record.

(Off the record).

Q. Mr. Ziegler, in your earlier testimony, in response to a question from Mr. Toohey, you indicated that in connection with the loans that you extended to the Herring-Hall-Marvin Safe Company from time to time that you received [fol. 629] balance sheets and profit and loss statements on Herring-Hall-Marvin from time to time.

A. That's right.

Q. Is that correct? I understood you, sir, to say that those records, however, had been destroyed?

A. That's right.

Q. Now, you have also testified that from your records

the bank made a loan in the amount of $50,000 to Herring-Hall-Marvin during the first part of May?

A. That's right.

Mr. McGovern: Would you mark this for identification?

(Thereupon, balance sheet of the Herring-Hall-Marvin Safe Company, dated April 30, 1959, was marked Defendant Diebold's Exhibit No. D 29 for identification.)

Q. Mr. Ziegler, I should like to show you Diebold's Exhibit marked for identification D 29, which purports to be a Herring-Hall-Marvin Safe Company balance sheet dated April 30, 1959. Are you able to tell us from your recollection today whether or not you received this balance sheet dated April 30, 1959, in connection with the additional $50,000 loan that the bank made to the company in May?

Mr. Monroe: I am going to object.

[fol. 630] A. I don't remember that particularly. I just don't remember.

Q. You have no recollection?

A. I have no recollection whether we received another one in place of this one or whether we even received this one, but we had the records on file but I don't know whether we received one like this or not.

Q. But you say you did receive current balance sheets from the company in connection with the loan application and the loans extended?

A. That's right.

Mr. McGovern: Would you mark these for identification?

(Thereupon, various checks of the First National Bank and Trust Company on the account of Herring-Hall-Marvin Safe Company, were marked Defendant Diebold's Exhibits Nos. D 30 to D 33, inclusive, for identification.)

Q. Mr. Ziegler, I should like to show you now four checks of the Herring-Hall-Marvin Safe Company identified as D 30, D 31, D 32, and D 33, for identification, and ask you to look at check D 30. Who is the payee of that check, Mr. Ziegler?

A. This is a A D T Company, 18 West Seventh Street, [fol. 631] Cincinnati 2, Ohio.

Q. What is the date of the check, sir?

A. Date of the check, October 6, 1958.

Q. Can you tell from the cancellation stamp, Mr. Ziegler, when that check reached the bank?

A. This is cancelled January 12, '59.

Q. Let me show you check D 31, sir, and ask you who is the payee on that check?

A. This is Rockford Machine Tool Company, Rockford, Illinois.

Q. In what amount?

A. $1,111.

Q. Payable?

A. Dated September 15, 1958.

Q. And cancelled when?

A. January 2, '59, I assume. Yes, January 2, '59.

Q. All right. And check D 32, payee?

A. Crucible Steel Company.

A. In the amount of?

A. $11,256.65.

Q. Date?

A. October 10, 1958.

Q. And cancellation?

[fol. 632] A. January 5, '59.

Q. And check D 33, sir?

A. This is also Crucible Steel Company, check for $12,094.50, and it is cancelled January 7, '59.

Mr. McGovern: All right, sir. Would mark that for identification, please?

(Thereupon, check of the First National Bank and Trust Company, on the account of Herring-Hall-Marvin Safe Company, was marked Defendant Diebold's Exhibit No. D 34 for identification.

Q. Mr. Ziegler, I show you check identified as D 34, and ask you, sir, if you would state the payee, the amount, the date, and when it was cancelled?

A. This is November 11, 1958, the Crucible Steel Company, for the amount of $10,970.53, cancelled February 6, '59.

Mr. McGovern: Mark these for identification, please.

(Thereupon, various checks of the First National Bank and Trust Company, on the account of Herring-Hall-Marvin Safe Company, were marked Defendant Diebold's Exhibits Nos. D 35 to D 39, inclusive, for identification.)

Q. Mr. Ziegler, I show you these checks marked for identification D 35 through 39, and request that you state [fol. 633] in the case of each such check marked for identification the payee, the amount, the date, and the cancellation.

A. The date is October 8, 1958. The payee is National Office Furniture of Chicago, the amount of $580, and cancelled April 29, 1959. Check dated December 31, 1950—I have to assume that is 8. I would know.

Q. It looks like 8.

A. American District Telegraph Company, Cincinnati, the amount of $1,073.52, and is dated—and it is cancelled April 13, 1959.

Check dated January 13, '59, Crucible Steel Company, $12,224.30, cancelled April 9, '59.

Check dated January 15, '59, Aluminum Company of America, for $16,494.41, cancelled April 10, '59.

Check dated January 1, '59, Aluminum Company of America, for $3,349.61, cancelled, I assume it is April 10, '59. Only 10, '59 is showing, but from the date of the endorsement on the back, that should be April 10, '59.

Mr. McGovern: Thank you. Would you identify these, please?

(Thereupon, various checks of the First National Bank and Trust Company, on the account of Herring-Hall-Marvin Safe Company, were marked Defendant Diebold's Exhibits Nos. D 40 to D 46, inclusive, for identification.)

[fol. 634] Q. Now, Mr. Ziegler, I show you checks identified as D 40, 41, 42, 43, 44, 45, 46, and ask you if in the case of each one of those consecutively you would identify for the record the payee, the amount, the date, and the cancellation.

A. January 12, '59, Frank W. Madden, the amount of $1,032.08, which is cancelled May 26, 1959.

February 12, '59, Walter Wehr, $200, cancelled May 1, 1959.

February 17, 1959, Aluminum Company of America, $5,519.70, cancelled May 13, '59.

February 17, '59, Aluminum Company of America, for $1,848.31, cancelled May 13, '59.

February 17, '59, Aluminum Company of America, for $10,892.25, cancelled May 13, '59.

February 18, '59, Aluminum Company of America, for $4,376.92, cancelled May 13, '59.

February 23, '59, Aluminum Company of America, for $3,835.61, cancelled May 15, '59.

Mr. Toohey: Mr. McGovern, would you ask the witness to explain the attachment to that check D 41?

Q. I ask you, Mr. Ziegler, would you look at the back of check identified as D 41 and explain what the attachment is? [fol. 635] A. Well, this is a receipt which is attached to each payroll check evidently. It says "detach before depositing." Evidently Mr. Wehr left that on with the check for some unknown reason. I don't know, but that should have been torn off before he deposited it.

[fol. 636] Mr. Toohey: What is the information on that attachment?

The Witness: This shows that that check was issued, voucher number—I don't know. It says, "East Hamilton Little League." I don't know their bookkeeping system, what that means, the numbers here——

Mr. Monroe: I am going to object to him answering further if he says he doesn't know.

The Witness: I don't know. This is in Herring-Hall-Marvin's operation. I don't know what that would be. But it says, "Detach before depositing," which should be torn off.

Mr. McGovern: Thank you, Mr. Ziegler. That's all.

Mr. Monroe: I am going to defer any cross examination until the Government—If they have any questions, I would like to preserve my right to cross examine Mr. Ziegler after you complete yours, if you have any questions.

Mr. Nolte: You mean waive final redirect to you?

Mr. Monroe: No. I have a feeling that you are going to ask him some of the same questions I would ask him, so I [fol. 637] would defer to you; and then if you don't ask him

the questions I would like to ask him, I would like to cross examine him right now.

Mr. Toohey: Mr. Monroe, it is our plan to continue this deposition from today, excusing Mr. Ziegler for the time being.

It's understood that he is willing to produce certain documents and arrangements will be worked out. For that purpose and for the purpose of inserting certain information where blank spaces have been left in the deposition——

Mr. Monroe: If you are going to defer any further examination, I would like to ask Mr. Ziegler a few questions right now.

Mr. Toohey: Go ahead. You understand Mr. Ziegler will still be under subpoena.

Mr. Monroe: Under those circumstances, I would like to go ahead and ask him just one or two questions.

Cross-examination.

By Mr. Monroe:

Q. Mr. Ziegler, you have been asked a number of questions about, I believe, the checks identified as Diebold number 30 through Diebold 39, in which there is a considerable [fol. 638] lapse of time between a date on the check and apparently the date at which the checks were cancelled by the bank. Now, can you tell from checks when those checks were actually issued or released by Herring-Hall-Marvin to the payee?

A. Not by the checks, no.

Q. There is no number on the checks to indicate the sequence in which the checks were issued?

A. They have a check number on the check. Here it says "Check Number" which I assume is their number. I have no way of knowing——

Q. But you can't tell from these checks as to whether they were actually issued by Herring-Hall-Marvin on the date which is typed on the check?

A. No.

Q. I just have one further question. As I pointed out above, there is some time between the date and when the checks were actually cancelled. Did Herring-Hall-Marvin

ever object to you honoring a check where there was a time limit involved?

A. No.

Mr. Monroe: I believe that's all.

Cross-examination.

By Mr. McGovern:

Q. May I ask, Mr. Ziegler, does the First National Bank [fol. 639] and Trust Company of Hamilton have any rule about stale checks, honoring stale checks?

A. Yes. If it is beyond a year, we question the date.

Q. Beyond a year?

A. Uh-huh, or probably six months in some cases.

Q. In line with Mr. Monroe's question, you never had any conversations with the people at Herring-Hall-Marvin Safe Company about the staleness of any of these checks?

A. No.

Mr. Monroe: I would like to object to the use of the word "stale."

Q. Let me ask you this, Mr. Ziegler: Can you state from your own knowledge of the bank's practice that that check reached the bank very close to that cancellation date in each instance?

A. Well, from prior endorsements on the check of the "Fed" and the original endorser, that would be the exact date that it was presented to us.

Q. In other words, the First National Bank in Hamilton did not hold those checks?

A. No, we did not hold them.

Mr. Toohey: Well, if there are no further questions from counsel——

[fol. 640] Mr. McGovern: Off the record.

(Discussion off the record.)

Mr. Nolte: Recess until what time?

Mr. McGovern: How long do you want to look at them? 2:00? 2:30?

Mr. Toohey: 2:30.

(Thereupon, at 12:16 o'clock p. m., the taking of the deposition in the above-styled action was recessed until 2:30 o'clock p. m., this same day.)

[fol. 641] Afternoon Session

Redirect examination.

By Mr. Toohey:

Q. Mr. Ziegler, may we have a look at those ledger sheets that were marked as Plaintiff's Exhibits, and they are not numbered but they begin the first of January 1959.

A. Well, they have January 2, '59, yes.

Q. And go through September 11, '59?

A. You say you want September 11?

Q. Through 11.

A. Oh, yeah. Right here. Well, that stops at 14. It ends up at 11. Here is the 14th, see.

Q. Mr. Ziegler, I'll give you the first two sheets, and the date January 2, '59, appears thereon. Will you look through those two sheets and tell me what the balance is as it appears for January 2nd on that account?

A. At the end of the day was $175,037.73.

Mr. McGovern: That is what date?

The Witness: January 2nd. That was the end of the day.

A. (Continuing) It starts with this total. The red figures are the checks, the black figures are the deposits. [fol. 642] Q. Looking again at these first two sheets, Mr. Ziegler, will you explain, if you know, the meaning of this column headed "deposits and checks"?

A. Well, I might refer you back to one of those sheets there. That is the total. In our bookkeeping system, we have a sheet something like that. The statement sheets that we give to the customers has a two check colum and a deposit colunm and a balance. In our own record, we combine the two. So in this column we have the double checks and the deposits in this column. They are not separated as on a statement sheet. Have you got a statement sheet?

Mr. McGovern: Yes.

A. (Continuing) This will show you. It might be confusing on here. This is the same date. These two deposits you'll find under deposit column.

Mr. Nolte: Let's identify for the record what he is referring to.

Q. Are you referring to a figure——

A. Black, with a plus behind it. This colmun is deposit.

Q. That figure is $22,000——

A. 850.

Q. It has a check behind it?

A. This is with a plus. These are our records.

Q. That plus indicates what?

[fol. 643] A. A deposit. It shows on the statement to the customer that he gets it is in a column by itself.

Q. And all these other figures?

A. The red figures are checks. 1,040.02.

Q. Now we go to the second column. It is titled "checks and analysis."

A. Checks and analysis is the check account, and analysis. There is 27 and 1 is the analysis. I don't know what the 2 here represents, foreign or clearing, but is it an analysis up here.

Q. Does this figure 27 appearing in this column entitled checks and analysis refer to the number of checks listed?

A. No, because here they have 73 down to 113. This is the actual check count. Here is the check count. This is the number of checks issued, 148. This has to do with the deposit, the number of checks. We charge three cents per foreign check.

Q. The figure 27 has to do——

A. With the checks they deposit on out of town items. There is a charge on foreign check deposits.

Q. What is the figure 27?

A. The number of items.

Q. The number of items?

[fol. 644] A. The number of items on deposit. That same thing does not appear on here.

Q. That figure 27?

A. It does not appear on that statement.

Q. On the statement sent to the customer?

A. No. It is from this figure plus this balance plus the number of checks that we figure our charges, which we figure down here.

Q. I show you another ledger statement and the first date appearing on the paper is January 14, 1959, and above it at the top of the page is a figure 97,535. What does that mean?

A. That has to do with the service charges. I just happen to have one here. On this group we figure service charge on the minimum balance, and in the month of January this was his minimum balance as it appeared on our sheet. So the bookkeeper or the girl who figures this writes down the lowest balance on that particular sheet in that particular month area.

Q. This figure was put there by the bank?

A. By the bank.

Q. For the purpose of——

A. Of figuring service charge.

Q. For the entire month of January?

[fol. 645] A. For the entire month of January.

Q. Even though this appears on a piece of paper where the dates representing balances do not go beyond January 15th?

A. That's right.

Q. In other words, if we were to look through some of these others, to go to the bottom——

A. All the way through January, you will probably find that 97,000 probably was the lowest balance.

Q. Here I do find a sheet, and the first date is January 30th. The second date is February 2nd. There is no 97,000.

A. No. Well, this is the sheet on which he wrote it probably in the middle of the month. Somewhere down in between January 2nd and January 14th there was a 97,000 balance in this somewhere which was the lowest balance that we had to show.

Q. That minimum balance which appears on these January sheets, 97,535, does that appear on the statement sent to the customer?

A. Oh, no.

Q. Does a like figure representing the same information appear throughout——

A. Every month there would be.

[fol. 646] Q. Every month?

A. There would be a low balance figure somewhere, to speed up——

Q. Can you tell me, Mr. Ziegler, how that figure is reached?

A. Minimum balance. In other words, we go down and check his entire month's balance. We figure the service charge on minimum balance. That is the lowest balance we went down to.

Q. Does that mean that figure, 97,535, would appear on here somewhere?

A. Sometime in January it is 97,000.

Q. Mr. Ziegler, I'm not familiar enough with these sheets to pick them out first hand, but would it be possible for you to go through them and read off as they appear those minimum balances for the dates at which they appear?

A. Well, I'll—here it is right here. On January 9th, $97,535.38. We dropped off the cents. They appear on January 9th.

Q. That means on January 9, 1959, a balance of $97,535 appears and that is the lowest for that month?

A. That is the lowest balance for that particular month, as far as our records are concerned. She puts it on there to show that, since there are probably a matter of ten [fol. 647] or fifteen sheets in a month, she puts it on there until we get to the end of the month to make sure there wasn't a lower balance in between that time and January 9th. Now then, you get at January 28th there is a lower balance. So that is it for that month.

Q. Well, to make sure, let me go through and try to find the next one.

Mr. McGovern: Jack.

Mr. Toohey: Yes, sir.

Mr. McGovern: May I suggest that it might help if you use the little accounting you sent us every month. They show us the low balance. This is month by month.

The Witness: Yes. We give them a statement of our

service charges on which shows the low balance for that particular month.

Q. That is what I asked you.

A. But it is not on the sheet, the statement, but it is in the sheet we sent them.

Mr. Reister: It is a white sheet.

A. (Continuing) A little white service charge, we render to all commercial accounts.

Q. Do you have those sheets?

Mr. Robinson: It is 97,535 for January.

[fol. 648] The Witness: Plus the number of items we charge for.

Q. What I would like to do is run through for the period January through September and state it for the record and we wouldn't have to fiddle around with these records. Can you do that, Mr. Ziegler?

A. These are my records, but the girl that makes these makes them off of here.

Q. If you are satisfied you can testify from those.

A. Oh, yes, I can testify those are absolutely correct.

Q. Would you use those then, please?

Mr. Nolte: Do you want to mark these for identification?

Mr. McGovern: He can answer and we will accept his testimony in the record.

Q. If you will, read from those in order from January.

A. This is June of '59. They go in reverse order here.

Mr. Robinson: There is the first one.

A. What do you want me to read, the low balance, the minimum balance?

[fol. 649] Q. The minimum balance.

A. We have that 97,535. That was for the month of January.

Mr. Robinson: There is February.

The Witness: And this is for the month of February is that?

Mr. Robinson: Yes.

A. For the month of February, the minimum balance is $142,586.

Q. That is February 1959; is that right?

A. February 1959. March, was there one in March? Is there a service charge in March?

Mr. Robinson: Yes.

A. (Continuing) For the month of March, minimum balance of $75,743. This is April, $6,143. For the month of May it was $27,871. For the month of June, $44,741. For the month of July is $33,751, and the month of August is $55,308. The month of September is $13. That was the low balance in that particular month. That is on the regular account. Now I might show you this. This is the General. This is the balance in payroll and this is probably the dividend account.

Mr. Robinson: Right, the dividend account.

The Witness: Is that the dividend account?

[fol. 650] Q. Those figures total then to show what the total balances in the bank were?

A. They would be if you want to take them all together, yes.

Q. May we then take those from these?

A. Just the 13 off of there, no more.

Mr. Robinson: It will save a litle time.

The Witness: Yes.

Q. These are the bank's own ledger statements?

A. Uh-huh.

Q. They have been marked as Plaintiff's Exhibits, and the first date appearing on this one is August 31, 1959. Would you look through those sheets, Mr. Ziegler, I think it may be just the first two, and tell me what the balance was?

A. The low balance, $13.92.

Q. That was for the month?

A. That was for the month.

Q. What appears on September 3rd?

A. September 3rd.

Q. I notice other entries with the date September 3rd.

A. Well, they are your postings. Every time there is a

posting made, here is September 3rd, September 3rd, September 3rd, September 3rd, and September 3rd.

[fol. 651] Q. Aren't these other figures for September 3rd?

A. Well, starting, pick up September 2nd balance, we had two deposits of $9325.66 is a deposit, $1455.97 is a deposit. The rest are checks up to that point. September 4th is another deposit.

Q. What are these deposits? This is September 4th. This is starting with the 4th. That is the 4th of September now. September 3rd starts from here on down and finishes up here (indicating).

Q. These other figures for September 3rd are postings earlier in the day or later in the day? What is the significance?

A. We post our deposits individually. Then we start posting checks. Then we get to the bottom of the sheet. We show the date of the ending on that sheet. When we have to go to a new sheet, it places the date. Place the date at the beginning of the sheet, so the date's correct regardless of what the balances might be. Then we continue and balance out here.

Q. Would you explain the significance of the figures appearing for September 4th? I note there are figures marked across, then there are these check figures which are different.

A. Those are analysis figures. Evidently on this par-

[fol. 652] ticular deposit there were foreign checks, foreign items.

Q. That is a deposit on September 4th of——

A. 18,000.

Q. $18,000?

A. Yes.

Q. There is no check?

A. No check figure. There is probably no analysis. Evidently the sheet was local clearings or something on that order.

Q. The next deposit?

A. $21,389.99, four items. There might have been more than four items on the deposit ticket. There might be some cash involved, but this is what we figure our charges on.

Q. The next deposit on September 4th is what?

A. $724.70, with three chargeable items.

Q. Three chargeable items. They include cash?

A. No. The deposit might include cash, but in this deposit with cash and checks there are three checks that are probably through banks outside the city of Hamilton, on banks outside.

Q. Another deposit on September 4th was——

A. $17,843.70.

Q. $17,843.70. There follows the figure 21.

[fol. 653] A. 21 items.

Q. 21 items drawn on banks outside?

A. Well, drawn not on our bank. That is the only thing, whether it is foreign or clearing, I don't know which one that is. You notice this has a different number 117, 1, 4, and that is clearing. I don't know how these machines pick up that figure, whether they have clearing first or foreign first, but they are chargeable items on which we charge a service charge.

Q. Going to September 8, 1959, on the bank's ledger sheet there appears a deposit of $59,502.09 followed by the figure 64. I take it that means you charged him for 64 items?

A. That's right.

Q. Now, on September 10, 1959, I have no difficulty with the first deposit on that date, but the second deposit of $6,846.94 is followed by something we haven't had yet.

A. That is either local clearing, a check drawn up on another bank in Hamilton, plus 11 foreign items.

Q. The first number indicates the local clearing?

A. Local clearing, the second's foreign.

Q. And the second digit which is 11 indicates foreign?

A. That's right.

[fol. 654] Q. Now, the next deposit on September 10th, $186.70, the figure 1.

A. There is one foreign item in the deposit, just not one item making this total but one foreign item in the deposit.

Q. Would you read off the other deposits made on September 10th that appear on that record, Mr. Ziegler?

A. Which ones have you got there? Do you have those? There are only three of them on September 10th. These are September 11th. It start up here September 11th.

Q. What is the meaning of these figures here?

A. This is checking. The girl that checks these and puts these figures on top states those as low balances on that particular day, 1392. She checks them and tries to hit the low balance.

Q. What is the low balance on September 10th?

A. September 10th. 15,000. No, 12,000. It starts out with 12,258. A deposit boosts it up, and the final day's balance is 15,350.

Q. The high balance for that is what?

A. 19,291.

Q. $19,291. Mr. Ziegler, I am going to show you the documents, your bank ledgers, going through the month of May.

A. Uh-huh.

[fol. 655] Q. Would you look at them, first, and tell me if you can from that examination how many checks were written during that month?

A. The month of May?

Q. Yes.

A. 1389.

Q. How many?

A. 1389.

Q. 1389 checks written during the month of May?

A. Uh-huh.

Mr. McGovern: May I suggest, that information, Mr. Ziegler, is not checks written but checks to clear the bank?

The Witness: Well, checks we have posted against this.

Q. At the end of the month, did you have a cumulative figure?

A. That's right.

Q. Of the number of checks or postings?

A. Of postings, that's right.

Q. By looking at that, can you tell us what the minimum balance is? I know we've got it from those other documents.

A. It looks like 27,000—27,871, and it is 27,871 on [fol. 656] May 5th.

Mr. Toohey: Let me ask you, Mr. McGovern, do the documents that you are going to give us, produce, show us in substitution for these, show the cumulative number of checks for the month?

The Witness: Do you have the May charge slip? The May charge slip, that white slip, will tell you how many local and how many clearing and how many onus checks. The onus figure should coincide with this figure. That will be in your June statement.

Mr. Robinson: Yes.

Mr. McGovern: You can get it, but you have to divide a little before back into the number. They say number of out-of-town times five cents, 670. So you have to divide a nickel back into it.

The Witness: No. We got the actual count. It will be in your June Statement.

Mr. Robinson: Here you are.

The Witness: It should be 1389. One clearing and 751 foreign items, and 1389 checks drawn.

Mr. Nolte: Those figures are the total for the month?

The Witness: Those are monthly charges.

Mr. Fitton: It is at the end of the month for the corpora-
[fol. 657] tions. Individuals are scattered through the month.

Mr. Nolte: The calendar month.

Mr. Robinson: The number of checks paid 1316.

The Witness: I have 1389.

Mr. McGovern: That is the number of checks?

Mr. Robinson: Number of checks paid at five cents each.

The Witness: No, that isn't. This is for the month of June. It is probably in May then. That was for the month of June. You probably put it back in your May line-up. It would appear on your June charges.

Mr. Robinson: It is a June charge. I see what you mean.

The Witness: It is a May charge.

Mr. Robinson: 1389.

The Witness: And one foreign, and 751 clearing.

Mr. Toohey: May I ask you, does that appear on that ticket?

Mr. Robinson: Yes, you are right, 1389.

Q. This ticket you are referring to has not been marked but we have recorded information from it. Previously you recorded the minimum monthly balances from these docu-
[fol. 658] ments. Now, in addition, these documents show the total of checks posted to the Herring-Hall-Marvin ledger?

A. That's right.

Q. That month?

A. That is the total number, yes, the total number.

[fol. 659] Q. And I see that the number 1389 does appear there. For a short-cut, may we go through those and get the number of checks?

A. They are authentic——

Q. I could short-cut that and just ask you, Mr. Ziegler, if you know, whether this was typically the amounts, give or take a few hundred, of the checks so posted to Herring-Hall's account each month during the period January 1 through September 11, 1959?

A. Well, this would be the accurate account printed on the machine figure.

Q. Well, maybe we better do that.

A. These are the accurate accounts on the machined figure. Now, the number of checks on regular account, that is the general account, charged against the account, was 1436.

Q. That is for the month of——

A. January.

Q. —January 1959?

A. Uh-huh. Number in February is 1212 checks. For March it's 1271 checks. For the month of April it is 1338 checks. For the month of May it's 1389 checks. For the month of June it's 1316 checks. July, it's 1376 checks; and for August it's 1158 checks.

Q. Can you give us part of September?

[fol. 660] Mr. Frank Robinson: No, because that would be split.

Q. Well, perhaps you can tell from that, from the bank's own ledger statement, Mr. Ziegler.

A. September 30th is a 1004 checks.

Q. Well, does it appear as of September 11, 1959, how many checks were posted up to that time?

Q. Oh, how many checks were posted up to September 11th? September 11th is 304 checks.

Q. Three hundred four checks had been posted up at the end of the day's business.

A. That's September 11th.

Q. September 11th, 1959?

A. That's right.

Q. Can you tell us by looking at those what the maximum balance was from September 1st, 1959 to September 11th, 1959?

A. Maximum balance?

Q. Yes.

A. 167 thousand——

Q. 167 thousand?

A. That's right. But now, when you say "maximum," that there is after the posting of the deposit. At the final, at the end of the day, it was 137,979. That was the maximum [fol. 661] balance at the end of the day.

Q. That's the maximum balance?

A. That's right. That's the maximum balance, 137,979.70.

Q. The maximum balance at the end of business September 11, 1959 was $137,979.70?

A. That's right.

Mr. McGovern: That was at the close of business on what date?

Mr. Toohey: September 11th.

The Witness: At the close of business, September 11th.

Mr. McGovern: What was that figure again? I didn't hear it.

The Witness: $137,979.70.

Q. Will you look at September 10 and tell us what the balance was at the close of business?

A. At the close of business it was $15,350.25.

Q. That seems to be a difference there. Will you recite the amount of deposits made on September 11 which brought the figure up to 15,000?

A. There were six deposits beginning with $17,772.98, $442.10, $588.50, $18,648.38, $50,000, $64,309.08.

Mr. McGovern: May I interrupt to ask, would that 50,000 [fol. 662] be those two loans?

The Witness: That loan. That's those loan notes.

Q. How can you tell that?

A. I couldn't tell you that.

Q. It's just recollection of that figure?

A. That's right. I can't tell what it was.

Q. Otherwise, every other deposit made that day was,

as I see it, either a clearing—posting of a foreign item or a local item?

A. That's right.

Mr. Toohey: May I see those documents just once more?

Mr. McGovern: Yes (handing).

Q. Mr. Ziegler, you were asked by Mr. McGovern to examine this page from the Lybrand report, a report which Mr. McGovern has filed with the Court, and it's entitled "Schedule C, Net Amount of Regular Payroll; Reimbursement of Payroll Account; and Book Balances" for the month of May 1959; and I now show you the Defendant's Exhibits—first Defendant's Exhibit 10.

You have already been asked to read the date, the payee. I would like you to read the number of the check and tell me where it is in this colum, "Reimbursement of [fol. 663] Payroll Account," on Schedule C, if you can.

Mr. McGovern: May I ask, what is the amount of that check?

The Witness: Ten thousand.

A. This is paid May 1st, '59 off the regular account. Now then, whether this coincides with the dates here, that I don't know. I mean I can't tell.

Q. You can't tell from that check what reimbursement it represents?

A. No.

Q. Let me show you then Defendant's Exhibit 8 and see whether you can identify that check in that column? Would you please give the number of the check?

A. Now, whether their date corresponds with what we have, I don't know. I don't know what these dates mean unless this is the date that they issued the check. But this was cancelled by us on May the 1st, '59, and it is dated May 1st, '59.

This is it, $16,047.66. Evidently it represents a part of that plus something else. I don't know. But here the cents are the same, but 6,000 plus 10,000—It was May 1st and we cancelled on May the 1st.

Q. Well, if I asked you to do this——

Mr. McGovern: May I see that check once more?

[fol. 664] Mr. Toohey: Which one do you want?

Mr. McGovern: That one.

Mr. Toohey: Exhibit D-8?

Mr. McGovern: Let me just interrupt, if I may, to ask Mr. Ziegler whether or not the total of these two checks is not the total of the two checks shown up there?

The Witness: That would equal that amount, but whether these are that, I don't know. I can only say that this portion of this check is the same as these figures here. Now, what makes up the 20,000, I don't know.

Q. Mr. Ziegler, perhaps we can do it this way: There are a certain number of items here, certain number of checks. Now, as far as I know, they are in order as of clearing dates. In other words, they now run consecutively as to clearing dates.

Disregarding the dates which appear on Schedule C, running from May 1st through, will you match, if you can, these checks against the amounts given in the reimbursement payroll account?

A. Well, if the foregoing conclusion is correct that these two checks represent this, the next one would be the $20,000 one, which is dated May 1st, which also is cancelled——

[fol. 665] Q. Perhaps, Mr. Ziegler, if we did this a little more slowly and checked off on that list to keep ourselves in order——

Mr. McGovern: You might put the number of the exhibit, Mr. Toohey, down beside the amount.

Mr. Toohey: All right, we will do that.

Mr. McGovern: That first two checks he obviously can't reconcile excepting total.

Q. All right. That is Exhibit D-8 and D-10, we cannot reconcile.

A. I have sorted those last three according to numbers of checks. Assuming that these numbers correspond with the numbers of the checks, now then, these two are what? Sixteen and ten is 26,000, would be these two, according to —I have to just assume that. I have no way of knowing what those checks represent.

Q. All right.

A. This 10,000 is either part of that or this 10,000. It's either one of these two checks, probably make up this 26.

What the other ten is, I don't know, but they are both May 1st.

Q. Well, Mr. Ziegler, there is another way to do this. We could start from the bottom and go up if we are encountering difficulty at the top.

[fol. 666] A. I don't know what they mean by these figures here, whether that's the date at issue or what that means.

Q. No. We are going to match the dollar amounts.

A. Trying to match the dollar amounts. Go from the bottom up then. It would be 114,002, which doesn't appear—This is June the 1st. That's part of this one (indicating).

Here is 20,000, so that would equal this amount here.

Q. O. K. That's Defendant's 26 and 27, would equal this amount?

A. That's right. And then we have a $10,000 item which is dated May the 28th. I wouldn't know where this would appear on this statement. This is dated May the 28th also and it was cancelled on June the 1st. I don't know what kind of bookkeeping they had, but there is a $20,000 item. Whether that's in, I don't know.

Mr. Toohey: Let me ask this question of Mr. McGovern: Can we take it, Mr. McGovern, that the figures appearing over here on the far side of Schedule C of your exhibit represent clearing dates?

Mr. McGovern: Yes, clearing dates in this sense, they are the dates on which those checks were deposited. You [fol. 667] will note that the payroll checks, if you will permit me to testify just a moment—the payroll checks are all dated the same. In other words, the May 8 payroll checks would all be dated the same. This is the May 8th payroll down here in the total amount of 37,000; but these checks would be deposited subsequently, depending upon what the cancelation date shows.

Mr. Toohey: These cancellation dates on the checks can be matched against these checks?

Mr. Frank Robinson: That's exactly right.

Mr. McGovern: May I say whatever the reason for this up here——

Mr. Toohey: You are referring now to what?

Mr. McGovern: Well, these two other checks that the

witness could not reconcile because of the fact that 10,000 was a carry-over from the preceding week's payroll that had not been made up. Therefore, they tossed in two checks in that form. But this is the first check off of that form, but the company treasurer wrote these two checks.

The Witness: If this (indicating) is the deposit date, then this June the 1st check would be lined up in this manner here (indicating).

[fol. 668] Mr. McGovern: I think by cancellation, Mr. Ziegler.

The Witness: By cancellation, yes. This June the 3d would be a $10,000 item, would be that item right there (indicating).

Mr. McGovern: That is those two there (indicating).

Mr. Toohey: Let's mark that.

Mr. McGovern: Ten thousand.

The Witness: Then this is the $32,768.08. This is May the 28th, '59.

Mr. McGovern: I just wonder if we haven't got another June here.

The Witness: This is it right here. Here is your June 1st cancellation of 20,000, June 1st concellation of $114.02. That's 25 and 26. We have got 26 and 29.

Q. It should be 26 and 25?

A. 26 and 25. Now then, on June the 2d, there is a $20,000 item. That would be this one (indicating).

Mr. McGovern: You just got that.

The Witness: That's 27.

Mr. McGovern: You just got these three.

Mr. Toohey: We don't have this one.

[fol. 669] The Witness: This is 27, and this is 28. This is a 10,000 one.

Q. This is 27?

A. 27.

Q. And 28?

A. Now, 28—Now, you have $32,768.08. That would be May the 28th. That would be this amount here. That's 24.

Mr. McGovern: The next one should be 5.

A. (Continued.) The next one should be 5. That's May

the 27th. That's D-23. This is May the 26th, 10,000, D-22. We have the 25th for 10,000, D-21. This is May the 22d, $12,447.17. That's D-20.

This is May the 20th. It's 15,000 and it's D-19. It's that one (indicating). This is May 19th. It's for 20,000, D-18. This is May 18th for 20,000. That's D-17. This is May 15th, $26,108.16. That's D-16. That's this one here (indicating). This is dated May 15th for $10,000—or May 13th, this is.

Q. What would you make that cancellation out to be?

A. Huh?

Q. I can't make it out.

A. I can't either. I don't know which one it is. It is cut over, two cuts on it. But that's a 10,000, assuming that it's 13 instead of 15. That's D-15.

[fol. 670] This is for May 12th. That's 10,000 and that's D-14. Then we have May 11th for 10,000. That's D-13. That's that one.

And this is May 8, $8,277.63. That's that one, D-12. This is May 7th, 5,000. That's D-11. This May the 6th for 10,000, D-9. This is May the 5th for 10,000. That's D-7.

Now then, this is May 4th, '59. That's 20,000. That's D-6. We have May 1st, '59. Now, wait a minute. This is the combined total, would be 26—No. Two May 1st cancellations, one for 10 and the other one for $16,047.66, combine these two totals. That's D-8 and D-10.

Mr. Frank Robinson: Off the record.

(Discussion off the record.)

Mr. Toohey: We will go back on the record.

Q. Now we are looking at Defendant's Exhibits 1-A through 5. Can you tell me where that appears, in whatever form, the deposit of 16,000——

A. I am only going on totals. This shows a deposit of $26,047.66 to the payroll account.

Q. As of what date?

A. On May 1st.

Q. On May 1st there was a deposit of $26,047.66?

A. Yes. Then on May 4th there was a deposit of $20,000, May 5th of 10,000, May 6th of 10,000, May 7th of 5,000 [fol. 671] and May 8th of $8,277.63 and May 11th, 10,000;

May 12th, 10,000; May 13th, 10,000 and May 15th was $26,108.16.

Then May 18th, 20,000; May 19th, 20,000; May 10th, 15,000 and May the 22d, $12,447.17; May the 25th, 10,000; May the 26th., 10,000; May the 27th, 5,000; May the 28th, $32,768.08; and on June the 1st, $20,114.02; June the 2d, 20,000; June the 3d, 10,000; June 5th, which does not show here, $12,744.74.

Q. Well then, Mr. Ziegler, does your examination of Defendant's Exhibit D-1-A indicate that this is a statement given to the customer by the bank—your examination indicates that there was a deposit on May 1st——

A. That's right.

Q. —of $26,047.66; and would you be satisfied in characterizing these—or testifying that these Exhibits numbered D-8 and 10 for $16,047.66 and $10,000 respectively are the checks by which that deposit was made?

A. I assume that that is correct. However, I would have to check the deposit itself to see what made up this $26,047.66. But since this is a payroll transfer, I assume that the combination of those two would make this amount.

Mr. Toohey: I have no further questions at this time of Mr. Ziegler.

[fol. 672] Mr. McGovern: Let me ask you, Mr. Ziegler: From the reimbursement of the payroll account, since Mr. Toohey has just taken you through it, does it not appear that the Herring-Hall-Marvin Company wrote its payrolls checks on a Friday night and did not succeed in covering all of those outstanding checks until the following Thursday or Friday?

The Witness: That's what it appears on this particular display.

Mr. Toohey: You are referring to Schedule C?

Mr. McGovern: Yes, the schedule that you just went over.

The Witness: That he made the deposits as the checks came in from them.

Mr. McGovern: That's all.

[fol. 673] Mr. Toohey: Mr. Monroe, do you have anything?

Mr. McGovern: While we are waiting for Mr. Monroe to decide, Mr. Toohey, may the record reflect at this juncture that we now have in this room all of the other

bank statements for all accounts of Herring-Hall-Marvin for the entire period going back through '56, and that we have all checks for the entire period from January 1, '59, through September 11, '59 in the room.

Mr. Toohey: Mr. McGovern, does that include payroll accounts?

Mr. McGovern: All accounts, all accounts.

Mr. Monroe: I have no questions.

Mr. Toohey: Well, we are excusing Mr. Ziegler at this time, holding him subject to the subpoena.

It is obvious that we cannot examine him on the documents back of January 1959. As the transcript of the hearing on February 13th discloses, the Court ordered at page—I'm not sure this is the correctly numbered page, but the Court ordered in that transcript: "We will put the Government on notice to show cause why they shouldn't take the evidence other than nine months."

"Mr. McGovern: Confine themselves to the first nine [fol. 674] months?"

"The Court: Yes."

That is the end of the quotation from the transcript.

Mr. Nolte: May we have the stipulation that that quotation from the Court, it reads "shouldn't" be "should."

Mr. McGovern: I think so. Before Mr. Ziegler leaves the stand, Mr. Toohey, would you like to make a tender of proof as to what else you will try to adduce in this proceeding if you are enabled to go beyond the Court's order back from '56 up through '59?

Mr. Toohey: Well, I don't think we have to show the color of our hand at this time, Mr. McGovern.

Mr. McGovern: Well, I suggest that the Court has said upon the showing of good cause.

Mr. Toohey: That's right; and the Court set a hearing, as I understand it, for 11:00 o'clock tomorrow morning. Rightly or wrongly, I'm not sure under the rules the Government is supposed to show good cause. That is the statement I quoted from the partial transcript we have at hand.

[fol. 675] Mr. McGovern: Let's face the facts of life. We are operating under the rules set by the Court for taking this deposition. The Court is entitled to apply any rule he sees fit.

What I am getting at, Mr. Toohey, is this: If you could indicate whether you would propose to examine Mr. Ziegler along the same lines with respect to the earlier years, those matters perhaps we can stipulate today before Mr. Ziegler leaves the stand. Specifically if Mr. Ziegler will say that to the best of his knowledge and recollection no check of the Herring-Hall-Marvin Safe Company during this period of time from '56 down to the present ever was reflected on the bank statement as an overdraft, I will accept that and stipulate it.

Mr. Toohey: Well, of course, these documents would show other things, Mr. McGovern, relating to the many years that you have covered in your supporting papers in your cross. You go back to 1944, and offhand I can think of one item where you say from 1953 on Herring-Hall-Marvin Safe Company had made frequent use of short term bank loans on a straight note basis. As I un-
[fol. 676] derstand it, that statement is based upon Mr. Mosman's statement. It is not based upon any records presently made available. I think it should be a proper subject of examination.

Mr. McGovern: Well, Mr. Ziegler I understand has no records about that other than what you see on this document here.

Mr. Toohey: Let me see whether I am clear on that.

Do you have any microfilm reproductions of documents going back through those years for any loans, Mr. Ziegler?

The Witness: No, no microfilm. This is actual cards, our actual ledger sheets.

Mr. Toohey: You do have?

The Witness: These are the actual ledger sheets that we have. These are solid records. These are not photographed. These we retain. This sheet number three would show there is a number one and number two ahead of this, that goes back beyond '51. That is the first entry on this. There is one and two ahead of this.

Mr. McGovern: That is the point I am getting at. You
[fol. 677] have there, I take it, the only records the bank has about these loans to Herring-Hall-Marvin from the beginning of time.

The Witness: You have the solid records that are retained. No microfilm. This is it.

Mr. McGovern: At the moment under the Court's order you are precluded from examining about this beyond '59. I will stipulate those exhibits at least for the prior years show what they show.

Mr. Toohey: Incidentally, we haven't marked these loan statements. Would you put them in order, Mr. Ziegler, so we may have them marked?

Mr. Nolte: Do you want these marked?

(Thereupon, loan statements referred to were marked Government Exhibits A to E, inclusive, for identification.)

Mr. McGovern: Off the record.

(Off the record.)

Mr. McGovern: Better go on the record. Mr. Toohey, I cannot prevent you from keeping Mr. Ziezler under subpoena. There is no question about that.

In the interests simply of expediency and convenience, I am trying to suggest that unless you can now predict some other area that you wish to examine Mr. Ziegler [fol. 678] about that we can perhaps stipulate from the documents we have here the same type of testimony you have elicited from Mr. Ziegler with respect to 1959.

Mr. Toohey: I see nothing wrong with your suggestion, Mr. McGovern: I would be very happy to take it up, but I don't see where that has anything to do with letting Mr. Ziegler remain under subpoena.

Mr. Nolte: Are you also offering to stipulate as to the perforation dates of checks in the earlier years?

Mr. McGovern: Sure.

Mr. Nolte: As contrasted with the dates on the face of the checks.

Mr. McGovern: Sure. Mr. Nolte, I understand from the bankers, I understand that is the only record they have of when the check came into the bank, the perforation.

Mr. Toohey: We excuse Mr. Ziegler at this time, and we very gladly accept your suggestion to work out whatever stipulation we can to get those facts on the record, whether they will be admissible after tomorrow or not.

Mr. Monroe: As I understand it, Mr. Ziegler does not [fol. 679] have to produce any additional records unless you specifically request them.

Mr. Toohey: That is the understanding.

Mr. McGovern: I think you have everything you want.

Mr. Fitton: If you want him, he can come right down, since he is busy with us.

Mr. Toohey: I'm not sure what you had in mind, Mr. Fitton.

Mr. Fitton: I don't mind him holding under the subpoena. If you need him, call him.

Mr. Toohey: This subpoena is just for this particular situation and we will not go any further. As soon as we get a satisfactory examination of all we are after, then we can excuse him and adjourn. This is not carrying Mr. Ziegler over to trial.

(Witness temporarily excused.)

[fol. 680] Mr. Nolte: Shall we swear Mr. Fitton and finish with him? May we have a stipulation for this deposition similar to the stipulation at the opening of the deposition of Mr. Ziegler?

Mr. McGovern: Sure.

Don W. Fitton, a witness of lawful age, being first duly sworn in the above cause, testified on his oath as follows:

Direct examination.

By Mr. Nolte:

Q. Mr. Fitton, will you give us your position with the First National Bank of Hamilton?

A. At the present time I am Chairman of the Board.

Q. How long have you held that position?

A. Since we had a meeting in January, 11th I believe. We had a meeeting the 11th. I retired as President and took the Chairmanship of the Board.

Q. That is January 11, 1961?

A. '61, yes.

Q. Prior to January 11, 1961——

A. I was President.

Q. You were President?

A. That's right.

Q. How long did you hold that position?

[fol. 681] A. Fourteen years.

Q. As President of the First National Bank of Hamilton, were you familiar with the credit agreements and arrangements between the bank and Herring-Hall-Marvin Safe Company?

A. Oh, yes.

Q. Will you please give us the basis and the extent, just a statement of the basis and the extent of your personal familiarity with that credit arrangement?

A. Well, as President of the bank, I was also on the Loan Discount Committee and all negotiations for loans of that size would at least come to my attention, even if not direct negotiation. Mr. Mosman came to me practically entirely when he wanted something, then we took it up with our committee. So I was familiar all the way through with it.

Q. Could we use those originals? I can refer to these and you can refer to the originals.

I refer to Government's Exhibit E marked for identification under that number, from the deposition of Mr. Ziegler just previously taken here. You were present while the deposition of Mr. Ziegler was taken; is that correct?

A. Oh, yes. Yes.

Q. Government Exhibit E is a photostatic copy Do you have the original of that exhibit in your hand, which [fol. 682] is marked Liability Ledger-Direct?

A. Yes.

Q. And has the letter "A" in the right-hand corner, the name Herring-Hall-Marvin Safe Company, address Grand Boulevard?

A. Correct.

Q. According to your knowledge, from and after January 1, 1959, does this record show the only loan account that Herring-Hall-Marvin Safe Company had?

A. That's the only one.

Q. This record evidences what type of loan?

A. Loans against the general credit or statement credit, demand loans mostly. They are all demand loans.

Q. They are all demand loans?

A. (Nodding.)

Q. I call your attention to the first entry for the year

1959 under "Date of Note." May 6, '59, is that correct?

A. Let's see. May 6, '59, yes.

Q. And the last entry under "Date of Note" in the year 1959, what do you have?

A. September 11, '59.

Q. Now, in the far right-hand column of this sheet, you have the term "Total Liability." Will you explain to us [fol. 683] what the figures entered in that column mean?

A. That is the total amount of indebtedness that Herring-Hall had at that time.

Q. When you say "at that time"——

A. At the date of the posting I mean.

Q. Is the date of the posting the date appearing under the column, "Date of Note"?

A. Well, that is the date of note, and of course the payments were made the other dates and they would come off of the final.

Q. You read it just as you would a railroad time table?

A. Oh, sure. September 11, '59, he owed $300,000; and on September 16th of '59 those three, four payments were made which paid off the loan entirely.

Q. What did he owe on May 6, 1959?

A. May 6th he owed 275—no—300,000. He had two $150,000 notes.

Q. Then immediatey prior to May 6, 1959?

A. Prior to that he owed $250,000.

Q. And he owed——

A. When I say "he" I mean Herring-Hall-Marvin, of course.

Q. Herring-Hall-Marvin Safe Company?

[fol. 684] A. Yes.

Q. Examining this exhibit, Mr. Fitton, does it appear from that exhibit that at any date during the period from January 1, 1959, to September 11, '59, Herring-Hall-Marvin Safe Company owed the bank on demand notes any amount less than $250,000?

A. On January 13th of '58 he owed 300,000, the company did. On May——

Q. Excuse me, Mr. Fitton. My question is from January 1, 1959.

A. Oh, excuse me.

Q. To September 11th.

A. January 1, 1959, he owed $250,000.

Q. My question further is from that date down to and including September 11th.

A. He owed that same amount until May the 6th, 1959, at which time he borrowed two $25,000 notes, which increased him to the legal limit of $300,000.

Q. Then what is the next figure, please?

A. Then on May 14th he made two $25,000 payments, which reduced the total liability to 250. That stayed the same then—until September 11th. No. Yes, September 11th, he borrowed $50,000 more which made $300,000. Then on September 16th that was all paid off.

[fol. 685] Q. Would you now please explain for us, Mr. Fitton, how this credit agreement was reached and also how it operated?

A. Well, we realized he was borrowing heavily but his account was good and we felt he was making progress and that we wanted to go that far with him.

Q. Was there any paper or record other than this sheet before you which evidenced this agreement or arrangement?

A. Not in writing, no. We had regular statements from him, interim statements every quarter, then of course his annual audited statement.

Mr. McGovern: May I suggest, Mr. Nolte, in response to the last question as to whether there was any other paper or record, there were of course notes.

Mr. Nolte: I am coming to that.

Mr. McGovern: Oh.

A. (Continuing) Of course, we had financial statements of course up to date.

Q. Well, the exhibit before you shows note numbers in the middle line column.

A. Yes.

Q. The third from the left.

A. Yes.

Q. In that column are the subheadings "old" and "new."

[fol. 686] A. Yes.

Q. Will you please explain what those numbers mean and how that aspect of the record was operated?

A. I assume the old numbers simply means payments

on the previous notes. The new ones, of course, are when he entered a new note.

Q. Do the numbers as they appear there represent the amount due on the note?

A. No. Every note has a certain number for posting purposes.

Q. While——

A. It has nothing to do with the amount.

Q. While any one of those individual notes or obligations was outstanding your bank had this number on its records; and did your bank also have in its files a note signed on behalf of Herring-Hall-Marvin Safe Company?

A. Oh, definitely.

Q. Bearing the number as shown here?

A. Oh, definitely.

Mr. McGovern: Off the record a moment.

(Off the record.)

Q. Now, Mr. Fitton, directing your attention to the number 408305 which appears in the column "new."

[fol. 687] A. $25,000 note.

Q. Explain if you will the column headings and the entries, if you can, which are referred to in that particular column beginning with 408.

Q. That $25,000 was entered under date of May 6, 1959, the number on that note you have there.

Q. May 6, 1959, would then be the date the note was given to the bank?

A. That is the date of the note. That is the date we gave him credit. That note is number 408304.

Q. The first one is 408305.

A. 305, yes.

Q. Two on the same date?

A. 305 and 304.

Q. Why would two separate notes be given on the same day?

A. I don't remember. I don't know whether he had them —if he thought he would pay off one quicker than the other, I don't know. He might have put one in for fifty. It would make no difference. The rate of interest is the same.

Q. The interest rate?

A. Four and a half percent at that time.

Q. Let's take the next column "new note, debit." It contains two $25,000 figures representing the face amount [fol. 688] of the notes; am I correct?

A. Well now, to get those debits, that old and new straight, you see this green 408304 and 305.

Q. On here it is black and white.

A. Then in the "old" right below that, the same number, 408304 and 305, that's when he paid those two notes off. If he paid on one of those notes, it would show in the left column.

[fol. 689] Q. On what date did he pay those notes?

A. They were paid off on May the 14th.

Q. Did he pay them both on May 14th?

A. Yes, sir; just brought the total down to 300—to 250.

Q. So that from the series of entries we have just been discussing, it appears from this exhibit that on May 6, 1959 he borrowed a total of $50,000, giving two $25,000 notes, and those same notes bearing numbers 408304 and 408305, and paid by him on May 14, 1959.

A. That's right.

Q. —bringing his obligation back down to its former $250,000 total; correct?

A. That's correct.

Q. How was the interest rate on those notes determined?

A. Oh, based upon the prime rate in New York City. You see it fluctuates in that column.

Q. If you know, as of May 6, 1959, what was the prime rate and how was this rate fixed?

A. I wouldn't remember because it fluctuates around. You can see in that column how it fluctuates, five and a half, two fives, four and a half, four and a half, and then up to five and a half, just to follow the prime rate.— [fol. 690] think he had about a half to one per cent above prime. I forget just how they——

Q. Do you recall that?

A. It wasn't a set figure, but in a situation, how hard up they were up, whether it was easy——

Q. It would depend on what?

A. Whether we were hard up, whether we had easy

money or didn't have money; like any other commodity, if it's scarce you pay more for it. But Mr. Mosman never was a chiseler on rate.

Q. The rate depended upon how much he had outstanding at that time too?

A. Oh, no, not so much, no.

Q. Now, Mr. Fitton, again directing our attention to those two notes given on May 6, 1959 and paid on May 14, 1959, upon the payment on the latter date what would your bank do with the note papers?

A. We cancelled them.

Q. And returned them to the maker?

A. Returned them to him; oh, yes. If he kept them, of course, he would have those. He might have destroyed them, but probably not. He probably has them there. We mark them off our records and cancel them, turn them back to him.

Q. What conditions attended upon his ability to borrow [fol 691] up to the legal limit, $300,000, from your institution in so far as your arrangement agreement with Herring-Hall-Marvin Safe Company was concerned? Again, I am speaking through your experience, if you know.

A. We thought he was entitled to it. We had his entire account in Hamilton and we felt——

Q. How did you arrive at that conclusion?

A. Just examination of his statements, discussion with him, prospects of interim reports he gave us showing sales and approximate earnings.

Q. How often would you or the committee of which you were a member review this?

A. Oh, we saw him constantly. Never a week went by but what he was in the bank. In Hamilton, if you are not familiar with it, there is a businessmen's club in our bank building, one floor above us on the bank floor. He ate lunch there and he would always drop down after lunch and talk with us. We were always in close touch with him.

Q. Were any alterations or changes made in the terms of this agreement during 1959?

A. No, not that I can recall. When he went up to the legal limit we asked him some more questions and we told

him we didn't want to continue on that basis, that top peak.

Q. Would you state that again, please?

[fol. 692] A. When we went up to our legal limit we told him we didn't want to continue on that basis excepting on a temporary basis. That was a little bit too high for us to want to carry permanently.

Q. Now, would you describe again and in as much detail and with as much specificity as you can recall the types of statements that he filed with you in the implementation of this agreement and the intervals?

A. Of course, each year we get the audited statement, and every three months we would get a statement from his auditor showing a progress report for those previous three months, total sales, estimated profit——

Q. Do you have any of those?

A. —and also the working capital position, whether it was increasing or decreasing.

Q. Do you have any of those statements in the records?

A. I think not.

Mr. Edwin G. Ziegler: I threw them away.

A. (Continued.) Those were all destroyed after Herring-Hall went out of existence as far as we were concerned. It was just a few months ago.

Q. Can you tell us approximately when they were cleaned out of your files?

[fol. 693] Mr. Edwin G. Ziegler: I threw them away sometime in November, I guess.

The Witness: When?

Mr. Edwin G. Ziegler: About November, I guess.

A. November. Of course, we didn't want those to get out because that was strictly private information between the former Herring-Hall and ourselves.

Q. Now, you said, I believe a few moments ago, that the interim statements filed with you from time to time in the operation of this account were certified statements?

A. Oh, no. They were made by his auditor. He brought them up. But the audited statement at the end of the year was made by this same firm, but the interim statements were not.

Q. When you say the same firm, to what firm do you refer?

A. I don't remember the name of it.

(Mr. Monroe hands document to witness.)

A. (Continued.) Lybrand, Ross Brothers and Montgomery, certified public accountants.

Q. You recognize that firm name?

A. I remember the name, yes.

Q. They audited the statements that were filed with you?

[fol. 694] A. Uh-huh. The others were made by his own auditors, which we accepted, of course, without question.

Q. Was security or collateral in any form ever required——

A. No.

Q. —in connection with these loans?

A. None.

Q. Did Herring-Hall-Marvin Safe Company at any time during '59, according to your information and recollection, have any mortgage outstanding with——

A. Oh, none.

Q. Any long-term obligation of any sort?

A. He had, originally when he took over the company, a first mortgage——

Q. I am limiting my question to '59 now.

A. Final payment on the mortgage he had I think was paid off before '59. I don't remember the exact date of it. It was a small payment——

Mr. Nolte: Do you want to strike that as unresponsive?

Mr. McGovern: I don't mind that last question. I was listening.

A. (Continued.) The record would show there when that mortgage—Of course, that's according to the record, but [fol. 695] I don't remember the date the final payment was made. But there was none later than '59, I know.

Q. During '59 did Mr. Mosman, on behalf of Herring-Hall-Marvin Safe Company, ever come to your bank for any loan that was refused?

A. No.

Q. Did he during 1959 at any time on behalf of Herring-

Hall-Marvin Safe Company come to your bank for a long-term loan to be secured by a chattel mortgage?

A. No.

Q. Any long-term loan to be secured by mortgage on real estate?

A. No.

Q. Did you at any time during 1959 have any correspondence with Mr. Mosman regarding this loan agreement as evidenced by Government's Exhibit E?

A. No. He was so available to us that there was no point in correspondence.

Q. You handled that then exclusively by conference with him——

A. That's correct.

Q. —and contacts—

A. If we wanted to talk to him, we would call him, have lunch with him. But we saw him so constantly there [fol. 696] wasn't much point in trying to correspond.

Q. Would you tell us again, Mr. Fitton, during what period of time you were President of the bank?

A. Fourteen years, until January 1st, 1960.

Q. Fourteen years prior to January?

A. Prior to that. Fourteen or fifteen, I think.

Q. During how much of that time did you deal with Mr. Mosman?

A. Oh, ever since—from the time he and Mr. Ball bought the plant, and I forget—He was there about, oh, I don't know; 8, 9, 10 years. I forget the date he took over the plant.

Mr. Nolte: One moment, please.

The Witness: That is '51—I think he was there 12 or 13 years.

Mr. McGovern: Mr. Nolte, may I suggest that you go ahead and mark those for identification? I would do it anyhow. It would clarify what we are talking about.

Mr. Nolte: I don't know why you make these suggestions just to embarrass me when I have it in my hand.

Mr. McGovern: All right. Strike it from the record.

[fol. 697] Mr. Nolte: Mr. Reporter, will you mark for identification as Government's Exhibit F what purports to be a note dated December 30, 1958 in the amount of $100,000?

(Thereupon, $100,000 demand note, dated December 30, 1958 of Herring-Hall-Marvin Safe Company was marked Government's Exhibit F for identification.)

Mr. Nolte: A note dated May 6, 1959 in the amount of $25,000 as Government's Exhibit G.

Mr. McGovern: May I interrupt to ask, Mr. Nolte, did you describe that first Government exhibit as a note for a hundred thousand?

Mr. Nolte: I did.

Mr. Frank Robinson: There are two such notes.

Mr. McGovern: December 30, '58?

Mr. Nolte: Yes. Here, you are welcome to look at it.

Mr. McGovern: No. Then there was another for the same date?

Mr. Frank Robinson: Yes.

Mr. Nolte: Here, look at it.

The Witness: There were three of them, three of them on that date.

Mr. McGovern: Three of them, that's right.

[fol. 698] (Thereupon, a $25,000 demand note dated May 6, 1959 of the Herring-Hall-Marvin Safe Company was marked Government's Exhibit G for identification.)

Mr. Nolte: And a second note dated May 6, 1959 in the same amount, $25,000, as Government's Exhibit H.

(Thereupon, a $25,000 demand note dated May 6, 1959 of the Herring-Hall-Marvin Safe Company was marked Government's Exhibit H for identification.)

Mr. Nolte: Off the record, please.

(Discussion off the record.)

Mr. Nolte: A note dated September 11, 1959 in the amount of $50,000 as Government's Exhibit I.

(Thereupon, a $50,000 demand note dated September 11, 1959 of the Herring-Hall-Marvin Safe Company was marked Government's Exhibit I for identification.)

Mr. Nolte: And finally, a note dated December 30, 1958 in the amount of $50,000 as Government's Exhibit J.

(Thereupon, a $50,000 demand note dated December 30, 1958 of Herring-Hall-Marvin Safe Company was marked Government's Exhibit J for identification.)

Q. Now, Mr. Fitton, would you take Government's Exhibits F through J and match those up with the entries——
[fol. 699] A. On the sheet?

Q. Yes.

A. Well, here is one dated December 30th, '58 for $100,000. The number of that note is 407089, December the 30th, '58 in the amount of $100,000. That compares with the ledger.

Here is one December 30th, '58 for $50,000. The number of that note is 407088, and that compares with the ledger.

Q. Yes. Identify that as a Government exhibit.

A. Oh. And that's Government's Exhibit J, and the first one is Government's Exhibit F.

Q. Thank you.

A. And here is Government's Exhibit G, note for $25,000 on demand dated May the 6th, 1959. That number is 408304.

Q. Government's Exhibit G?

A. That is G. Next is Government's Exhibit H. That's $25,000 on demand, dated May the 6th, 1959, number 408305. That compares to the ledger.

And this note is one for $50,000 dated September the 11th, 1959 on demand, number 409509 in the amount of $50,000, and that is Government's Exhibit I.

Q. Then we are missing, are we not, in these Govern-
[fol. 700] ment exhibits——

Mr. McGovern: Off the record.

(Discussion off the record.)

Mr. Nolte: Mr. Reporter, will you mark note dated December 30, 1958 in the amount of $100,000 as Government's Exhibit K?

(Thereupon, $100,000 demand note dated December 30, 1958 of Herring-Hall-Marvin Safe Company was marked Government's Exhibit K for identification.)

Q. And, Mr. Fitton, will you check that against your ledger?

A. This is dated December the 30th, 1958 in the amount of $100,000 on demand, number 407090.

Q. And it's Government's——

A. That takes care of——

Q. And it's Government's Exhibit?

A. Government's Exhibit K.

Q. Now, we have all notes entered on your ledger sheet from December 30, 1958 through September 11, 1959 accounted for; correct?

A. That's correct.

Q. I show you Government's Exhibit K, one of the notes for $100,000 dated December 30, 1958, and I ask you to look at the entries under interest rate on the note itself.

[fol. 701] A. Five per cent.

Q. Five per cent on the ledger sheet; is that correct?

A. That's correct.

Q. Will you please explain those various entries on the note?

A. We heisted him from four and a half to five, and I don't know——

Mr. Edwin G. Ziegler: Called rate.

A. (Continued.) Changed the rate. The others were the same, all five per cent.

Mr. Edwin G. Ziegler: It went to July 1st, '59.

That's when the call rate went up.

Q. The same thing appears on Government's Exhibit F, does it not?

A. You see, we review our demand notes every ninety days and we change the rates.

Q. Similarly with Government's Exhibit J?

A. That's correct.

Q. And the two notes given May 6, 1959, Government's Exhibits G and H——

A. There was no change.

Q. —have only one interest rate; correct?

A. Four and a half per cent. There was no change [fol. 702] in the rate during that period.

Q. And the note given September 11, 1959——

A. That was five and a half.

Q. Government's Exhibit I is five and a half——

A. No change.

Q. —and no change; correct?

A. That's correct.

Q. And referring again to the notes where the interest rate was raised from four and a half to five per cent, was that done by the bank in connection with all demand notes outstanding at that time?

A. We review our demand loan rates every three months and we adjust them. If there is a change in prime, we adjust them at that time.

Q. How do you notify the maker of the note?

A. We send them a notice; at a certain date the interest rate on your demand note will be five per cent or four and a half, or six.

Q. Who wielded the pencil, changed that?

A. It might have been Mr. Ziegler. It might have been my son. We notify them, and they make the change on them.

Q. That was done in the bank as an entry——

A. Oh, yes, after the committee had reviewed them and changed the rates.

[fol. 703] Q. And in that connection, with others, you treat Herring-Hall-Marvin as you did——

A. Just like all others.

Mr. Nolte: Cross examine.

Cross-examination.

By Mr. McGovern:

Q. Mr. Fitton, when you say that all demand notes were raised in terms of the interest rate uniformly across the board——

A. That is not quite true, not all. We reviewed all the notes. But there was some we couldn't raise, if there was collateral or special reasons why, maybe raised them too much before. But we reviewed them all and adjusted them in accordance——

Q. And time notes, of course, would be a matter of negotiation, wouldn't they?

A. That's right. If a time note comes due, that's reviewed right away for renewal.

Q. Now, those first three notes there, totaling a quarter of a million dollars, dated December 30th, 1958, were also demand notes, were they not?

A. Yes, sir.

Q. And they ran on, those first three notes, for a quarter of a million dollars, ran right on down through [fol. 704] September 16th, 1959, did they not?

A. There was an increase of 25,000.

Q. Yes, but the basic——

A. The other ones ran right through. They were all paid off September 16th, '59, that's correct.

Q. Now, am I correct in assuming that it is not a policy of your bank to let demand notes run on indefinitely?

A. No. We kind of shunned demand notes, because you are too apt to overlook them. The note comes on with a time limit, at least it gets reviewed at that time. If it comes to you as a demand, you may forget it. That's why we review them every three months.

Q. Normally you like to resolve those every three months?

A. We do.

Q. You testified, I believe, that you were anxious to have Mr. Mosman undertake to resolve his notes and reduce that liability?

A. That's correct.

Mr. McGovern: Would you mark that D-47?

(Thereupon, photostatic copies of cash control sheets kept by Mr. Schlegel were marked Defendant Diebold's Exhibit D-47 for identification.)

Mr. McGovern: Mr. Nolte, I have had the reporter [fol. 705] mark for identification as D-47 a photostatic copy of the cash control sheets kept by Mr. Schlegel, which you have seen previously and of which we have the originals right here in the box if you wish to check them further.

Mr. Nolte: Are these part of your motion papers?

Mr. McGovern: No, they are not. Many of the figures on the motion papers are taken off of these, but we have never identified the sheets.

Mr. Nolte: How can this witness identify them?

Mr. McGovern: He can't. I am asking you to stipulate— Do you recall many, many months ago I gave you a copy

of these? We have the original books here. You have been glad to accept other original books which I tendered today, have you not, without any question of authenticity. I suggest you accept this in the same terms.

Mr. Toohey: Let me look at it, Mr. McGovern.

(Mr. McGovern hands documents to Mr. Toohey.)

Mr. McGovern: Here (indicating) are the books if you want to check them.

Mr. Nolte: You have here, Mr. McGovern, 8 sheets.

[fol. 706] Mr. McGovern: Right. I am not sure I don't have 9 because it's supposed to go through September. I should have one for each month there.

Mr. Nolte: You have 9.

Mr. McGovern: Yes.

Mr. Nolte: Were these sheets delivered to the Government some months ago, nine pages?

Mr. McGovern: Exactly, and it's an exact copy of that, which itself is a photostat of that, the original.

Mr. Nolte: I mean that statement is an exact duplicate of what you delivered to the Government in Washington——

Mr. McGovern: Right.

Mr. Nolte: —some months ago?

Mr. McGovern: It is. I so swear.

Q. Mr. Fitton, I should like to call your attention to a document identified as D-47, which I can describe to you as Mr. Schlegel's cash control sheets in which he purported, you will note, to run his balances day by day on the various bank accounts, and then pull a total off over here in the last column (indicating).

A. Uh-huh.

Q. You will note from time to time on various of [fol. 707] these sheets—I am now looking at the sheet for the month of May—a good many red figures in these various accounts.

Mr. Nolte: Pardon me. They can't be red figures.

Q. Well, figures in parentheses, which I will describe for you as being red on the original; and similarly over here, total in all banks, a number of red figures; similarly for the month of June and the month of July, red nearly

throughout the entire month. Is that correct, on the First National?

A. (Nodding.)

Q. Parentheses showing red figures in the column for the total of all bank accounts.

Moving down now, Mr. Fitton, to the month of September, your date is over here (indicating), going down to the 10th, coming across on the tenth line. There you will note, will you not, for the First National Bank, red figures throughout the month, in terms of checks outstanding?

A. Uh-huh.

Q. And coming over, sir, to the final column, which is the total of all bank accounts——

A. 10th.

Q. —10th, the second line down in here, you will notice red figures, with the exception of September 1st when [fol. 708] there was $7,800 total in all banks. There was a subsequent deficit, first of 20,000, 25,000, 47,000, 27,000, 40,000; and on September 10th itself a deficit in all bank accounts of $41,000?

A. (Nodding.)

Q. Now, in view of that state of Herring-Hall-Marvin's finances, Mr. Fitton——

Mr. Nolte: I object to the question. It assumes a state of facts not in evidence. I object to any questioning on this document also unless this witness can testify—This witness testified on direct examination only about the loan arrangements.

Mr. McGovern: That's all right. I am going to ask about this right now.

[fol. 709] Q. In view of those facts that have just been set forth, on that exhibit to which you testified, Mr. Fitton, suppose——

Mr. Nolte: I object again. No facts in evidence. We object to it.

Mr. McGovern: We heard the objection. Let me go ahead.

Q. Suppose that any time during the first ten days of September the First National Bank had felt for any reason called upon to request Mr. Mosman to pay off that demand note, where would he have obtained the funds?

A. He wouldn't have. I don't know where he would have gotten them.

Mr. McGovern: That's all.

Mr. Nolte: Mr. Monroe, any questions?

Mr. Monroe: No questions.

Redirect examination.

By Mr. Nolte:

Q. Mr. Fitton, you said in response to Mr. McGovern's first question that you did not review all notes at the time of changes in the prime rate. Let me ask you——

A. The bank notes you mean?

Q. Yes.

A. We reviewed but we didn't always change the [fol. 710] rates.

Q. But upon such reviews and a change made, was a change made to all obligors whose notes were in a similar class——

A. That's correct.

Q. —to Herring-Hall-Marvin.

Mr. Nolte: No more questions.

Recross-examination.

By Mr. McGovern:

Q. One more, one last—I hope—question, Mr. Fitton. The demand notes outstanding on September 10th in the total amount of $300,000, or September 11th——

A. September 11th.

Q. —were paid off on September 16th?

A. That's correct.

Q. Who paid them off?

A. Diebold Safe Company.

Mr. McGovern: That's all.

Mr. Nolte: Do you know of your own knowledge that Diebold paid them, without reference to your record?

The Witness: Well, I know they did pay them. I forget how it came, whether Mr. Crawford or Mr. Robinson

[fol. 711] brought the checks in or whether they mailed them in.

Mr. Nolte: You don't have any independent recollection of that?

The Witness: No, I do not, but I know it was paid by Diebold Safe Company.

Mr. Nolte: No further questions.

We will suspend this deposition as we did the prior one, and excuse Mr. Fitton subject to further order of the Court.

The Witness: Might I ask how is that going to affect my going to Florida the 24th?

Mr. Nolte: We are going to hear more tomorrow.

The Witness: We are not to come down tomorrow?

Mr. Nolte: No.

(Witness temporarily excused.)

Don W. Fitton

[fol. 712] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Deposition of John Mosler of November 16, 1960

Deposition of John Mosler, witness of lawful age, taken on behalf of plaintiff in the above entitled cause, wherein United States of America is the plaintiff and Diebold, Incorporated and Herring-Hall-Marvin Safe Company are the defendants, pending in the District Court of the United States for the Southern District of Ohio, Western Division, pursuant to adjournment of November 16, 1960 by oral agreement of counsel for the parties and deponent, before a shorthand reporter and notary public of the State of New York, at the Federal Court House, Room 609A, Foley Square, New York 7, N. Y., on the 29th day of November 1960, at 10:00 a.m.

[fol. 713] APPEARANCES:

Walter T. Nolte, Esq. and John M. Toohey, Esq., Attorneys for plaintiff, Antitrust Division, Department of Justice, Washington 25, D C.

Messrs. Arnold, Fortas & Porter, Attorneys for defendant Diebold, Incorporated, 1229 19th Street, N.W., Washington 6, D. C., by: Victor H. Kramer, Esq., of Counsel.

Messrs. Taft, Stettinius & Hollister, Attorneys for Mosman Industries, Inc., 603 Dixie Terminal Building, Cincinnati, Ohio, by: Murray Monroe, Esq., of Counsel.

Messrs. White & Case, Attorneys for The Mosler Safe Co., 14 Wall Street, New York 5, N. Y., by: Edgar Barton, Esq., of Counsel.

* * * * * *

[fol. 714] JOHN MOSLER, called as a witness by plaintiff, being first duly sworn by the Notary Public (Albert R. Sparks), testified as follows:

Direct examination.

By Mr. Nolte:

Q. Mr. Mosler, would you give us your business and home addresses for the record, please?

A. Business address, 320 Fifth Avenue. Home address, 1035 Fifth Avenue.

Q. Is the business address the office of the Mosler Safe Company in New York?

A. Yes.

Q. You are connected with The Mosler Safe Company?

A. I am executive vice-president.

Q. Would you outline for us your duties and responsibilities in that position?

A. Well, I'd say that my prime responsibilities are in the marketing area and then I do various jobs. In other words, I am involved, I'd say, in all of the corporate activities.

Q. What departments of the company are particularly under you?

A. Particularly under me, the marketing activities.

Q. How long have you been associated with Mosler [fol. 715] Safe Company?

A. I was born in it. The first safe I sold was in 1937. I formally came with the company in 1946, to answer your question. Actually, it was 1946.

Q. Since 1946, give us the capacities served in.

A. I started in 1946 as a salesman and then I had a very rapid rise because of my great ability, my father being president and owner, and became vice-president of the company, I believe, in 1948 or 1949, and then with my father's passing in 1952, I became executive vice-president.

Q. Throughout this time you have been primarily interested in the marketing end of it?

A. Yes.

Q. A leading question: With what phases of the Mosler operations, if any, are you unfamiliar?

A. I would say that probably some parts of the finan-

cial management. I'd say I'm pretty familiar with practically all the operations of The Mosler Safe Company, fairly familiar. I might not have all the details, but I would say I have a good familiarity with the various activities of the company.

Q. Do you have, in the regular course of your work, contacts with Mosler customers?

A. To a limited extent, yes.

[fol. 716] Q. Can you specify that——

A. Yes. For instance, I will personally go out on certain larger jobs. I personally handle in a supervisory capacity the A & P account, which happens to be our principal commercial account. I feel that anyone in an executive capacity has got to have an understanding which only comes by getting out in the field; so I do try to get out as much as I can, which, unfortunately, is limited.

Q. Do you have any personal connection with the Chase Manhattan?

A. Yes. I made a presentation there.

Q. What contact or contacts do you have, Mr. Mosler, with The Mosler Safe Company's competitors in the course of your work?

A. Very, very limited. I meet them, of course, at association meetings occasionally, I meet them at conventions and occasionally we run into each other other than that.

Q. Who are the competitors of Mosler in the bank equipment field?

A. Well, the prime competitor today, of course, is Diebold, with the Division of Herring-Hall-Marvin.

Q. Any other competitors in bank equipment?

[fol. 717] A. Well, yes. They are considerably smaller.

Q. Excuse me. We are addressing ourselves to bank equipment only.

A. Yes. There is the Protection Equipment Company, which I believe is in Minneapolis, Hegeo, there is a new outfit called Bank Steel in Texas, there is a fellow by the name of Ditsur, who makes drive-in windows in Florida, then there is a firm—the name escapes me just for the second—in California, which has started in the manufacture of safe deposit boxes. Then there is the Smith-Wheelock organization—I believe he calls himself the American Bank

Equipment Company—of Toledo, Ohio. Then we have met foreign competition from time to time.

Q. Go over that list again as to the first two or three companies. What products do they make, comparable to Mosler's products?

A. For example, Peco primarily has alarms, drive-in windows, night depositories—I'm sorry, I also should mention here the Gross-Feible Corporation, LeFebure.

Q. What products do those companies make?

A. LeFebure is primarily in the under-counter equipment business, where they go in and they sell under-counter equipment, and they also sell bank systems primarily. They sell, besides that, Gross-Feible boxes——

[fol. 718] Q. What do you mean by "boxes"?

A. Safe deposit boxes.

Q. Do you mean bond boxes?

A. The entire safe deposit box. Besides that, they sell a safe—I have no idea who manufactures that—and a drive-in window.

As far as Gross-Feible are concerned, Gross-Feible primarily manufactures safe deposit boxes. I believe they manufacture a night depository and a drive-in window and they have been talking about a bank vault door. What they have done about it, I don't know.

Q. You don't know of any bank vault doors that they make?

A. They did make one a good many years ago, but it was just one door.

Q. Do you know of any maker of bank vault doors in the United States other than Mosler, Diebold and Herring-Hall-Marvin?

A. Every once in a while in this business, strangely enough, there is a sort of a bastard door that appears. We are competing down in Florida.

Q. In a bank?

A. Yes, in a bank. There is a salesman down there who sold a Gross-Feible box, I think it was Guardian boxes, [fol. 719] and then had a door made locally. This happens.

Q. To pin this down, would you say it is safe to state that the number of bastards in this business is insignificant now and in the past?

A. Off the record, you've got all our competitors in that line.

Mr. Kramer: Were you about to try to answer that question there?

A. The Herman Safe Company manufactured a group of doors. I'm not familiar with the exact number, but they put in doors for the Bank of America.

Q. You say they did?

A. They did, and still are. In other words, a bank vault door of the lighter manufacture—in other words, a 3.5-inch door is something which can be made spasmodically. In other words, it is not a highly-tooled item, necessarily so that it can be made—a company like Hermann or even Gross-Feible can sort of go in and out of the business. It's not true of the heavier doors. When you get to the 7-inch and 10-inch door—and it is 7-inch and not 7.5, as previously testified—the 7-inch, 10, 12, 16, 20 and 24, the only competition we have had is foreign competition.

Q. Foreign competition from what sources?

A. Well, from Parma, Italy, Chubb of England and then [fol. 720] this Bank Steel Corporation in Texas sold a German door. I'm not familiar with the manufacturer, but they are representing a German company.

Q. Do you have competition from these foreign manufacturers in sales in the United States?

A. Yes.

Q. In recent years have you had that?

A. Yes.

Q. Each year?

A. Yes—not each year.

Q. The last five years?

A. I would say that the five years is a very good division of time, because it has been increasing in the last five years. I would again say that it is not at this point a significant competition.

Q. It has not been in any of the last five years?

A. No, not a significant competition. There have been some sold, but not of significant quantities.

Mr. Kramer: I object and move to strike the word "significant," on the ground that it calls for a conclusion.

Q. What are your present sources of information in your day-to-day work concerning Mosler's products and its business?

[fol. 721] A. I don't understand the question.

Q. Well, is it records from your subordinates or——

A. Well, yes, we—of course, the overall banking figures are, of course, extremely interesting, but it is a very difficult business to pin down. I frankly—we are not—we have never been knowledgeable of the exact industries—it's not like, for instance, the soap industry or many other industries where you have actual curves that you can follow. I say what we try to do is to try to get every job we hear of and we try to hear of every job there is. As far as knowing exactly the percentage, we have no idea.

Q. Would you please name and give the items and positions of other Mosler officers whose knowledge would compliment your own regarding Mosler's products, its customers and its competitors?

A. Well, in other words, you'd like to know our sales executives; is that correct?

Q. Well, including production, sales——

A. Well, William Marquard is in charge of production. John Hampel and William Brasher are in charge of our two geographic positions we have, because we have an eastern and mid-west and western all combined.

Q. What are the titles of those two men and where [fol. 722] are they located?

A. John Hampel is president in Chicago, William Brasher has a title of director of administration in this city, Walter Brown is vice-president, but Walter Brown actually is only a salesman. In other words, he is our most competent salesman and he goes out on very sizeable jobs over the country wherever they are, and lends his guidance.

Q. Where is he located?

A. In New York City.

Q. What is his territory?

A. Any job any place in the world that comes up of any size, he will go out on it in a sales engineering capacity.

Q. That covers the entire United States?

A. That's right. Arthur Anderson is in charge of the Commercial Division in the eastern area of the United States. Ed Henning is the factory sales manager of the

Commercial. Ted Ellis is the factory sales manager for the Bank Division. We just appointed a new sales manager who just came with us just two weeks ago, and he hasn't started yet. I don't know if you are interested in that. We just appointed Fred Chisholm. He was formerly president of our Canadian subsidiary and was [fol. 723] formerly, before that, manager of Miller Safe Company in London, England. That is about it, our sales managers. Those are the people who have knowledge. Internationally, of course, we have a completely separate operation.

Q. What is the jurisdiction of the president of the company? Is he your brother?

A. He is my brother, yes. My brother has not gotten into sales as much as I—I mean, he leaves that pretty much to me. He principally is involved in personnel within the company, he works very closely with Marquard in production and principally is guiding our international company, and besides that is our representative—our representative to people.

For instance, he is the national president of Junior Achievement. He is in many extra-curricular activities and he has taken that over more than I have, and he spends considerable time on these activities, too.

Q. How about Mr. Coleman?

A. Martin Coleman is the vice-president in charge of finance.

Q. His jurisdiction is largely limited to that area, is that right?

A. It's largely limited to that area, with the exception [fol. 724] that he acts as president of Mosler Research Products, which is the alarm company, the electronic company.

Q. Does that company manufacture as well as engage in research?

A. Yes, it manufactures as well.

Q. Mr. Mosler, I think you said you sold your first bank vault door in 1937.

A. It was a safe.

Q. No bank vault doors?

A. No.

Q. You have sold bank vault doors?

A. I have been—it's extremely helpful to a salesman who is, say, working on an account any place, you know, to bring Mr. Mosler in and introduce him, and I have helped to sell some jobs. I personally did guide the Chase Manhattan job here in New York. It is the largest job which we have received in recent years. I would say that I do a considerable public relations job with banks by going out and meeting with them and so forth.

Q. To your knowledge, for how many years has Mosler been in the business of manufacturing bank vault doors?

A. Well, the business was started originally as just manufacturing—a sort of job shop—you know, somebody came along and said, "Make me a safe," and my great [fol. 725] grandfather made a safe. The records are scarce. The recent years that I have records on, would be the late 60s or 1870s or something like that. The records are very scarce. There were no taxes, you know——

Q. Post-Civil War?

A. Yes.

Q. What was Mosler making other than safes prior to the bank vault door era?

A. Well, it was—my great grandfather, originally he was kicked out of Germany because he was a newspaper publisher, and he arrived in this country and he manufactured some wheelbarrows, strangely enough, and then——

Q. That is out of our line. Let's get up to safes.

A. That period was so long ago that——

Mr. Kramer: Off the record.

(Discussion off the record.)

Mr. Barton: That was a hundred years ago, wasn't it?

The Witness: It was a sort of a job shop. I imagine if somebody wanted something built, he would build it—that's all.

By Mr. Nolte:

Q. If you know, when did Mosler go into the field [fol. 726] of insulated products, fire resistive products?

A. That was the start.

Q. What?

A. That was the start of the company, the insulated safe.

Q. You advertise your company as one dating back to 1848?

A. That's right.

Q. Insulated products preceded bank vault doors?

A. That's right.

Q. To your knowledge, what are the unique features of a Mosler bank vault door in terms of construction, as compared with the doors of its competitors?

A. Well, I would say primarily design and service, sales engineering service. In other words, you have to recognize the bank vault industry is a captive industry. In other words, we cannot create the sale of a bank vault door. The bank decides they are going to build a branch. Our job is to come in at that point and render a service to help them with any problems they might have, even problems out of our field, so that in the door—you see, we primarily sell design. The personal relationship of our salesmen and the bankers, the reputation of the company for quality, the [fol. 727] testimonials from bankers who have used our products to great success——

Q. Do you put anything into your bank vault door to make it burglar-resistive that the Diebold Company does not put into their door?

A. I am not that familiar with what Diebold puts into their door. I am sorry. I would say that since that is not an area of importance, because of the insurance problems that banks have—in other words, if a bank buys what we call a 10-inch door, they receive a 10-inch rate.

Q. That is true whether the bank buys a Diebold door, an HHM door or a Mosler door?

A. Or any other door. I would like to add to that, too, that since, say, 1920, I believe, or you can probably go back before, there has never been a successful burglary of a modern bank vault door, and therefore the banking public, let's say, respects the fact that the door will resist burglars and if we come in and say we put metal X in there, it is not going to be a determining factor in the sale, and therefore in recent years we have gone in for the design, actually, because the doors are doing the job.

Q. Does Mosler manufacture bank vault doors in both rectangular and circular shapes?

[fol. 728] A. Yes, we do.

Q. The circular shapes are bank vault doors as distinguished from emergency doors?

A. They are both, because we manufacture a round and a rectangular emergency door, and we manufacture a round and a rectangular main door.

Q. Does Diebold make a circular bank vault door, if you know?

A. I don't know. In other words, the demand for the circular door has been so small that actually when I say we make round bank vault doors, the ones we have sold in recent years have been from castings which were already in our plants and machined, or used round doors.

Q. Are rectangular vault doors in general use today?

A. In 99-99/100ths per cent of the cases.

Q. And Diebold and Mosler make rectangular doors?

A. Yes.

Q. Does the HHM Division of Diebold make rectangular doors?

A. Yes.

Q. Are these doors made by these three similar in shape? I mean, do they run through a series of sizes, of similar sizes?

A. The size of the door is pretty well, almost out [fol. 729] of our hands.

Q. You mean thickness?

A. Thickness, yes—in other words, a 10-inch door receives a certain insurance rate, a 7-inch door receives another insurance rate and a 3.5 receives another; so there is no advantage to building a 3.5-inch door, because it offers no advantage in the insurance rate.

Mr. Nolte: Let's adjourn for lunch.

(Whereupon, at 12:30 p.m., a luncheon recess was taken to 1:35 p.m.)

[fol. 730] Afternoon Session
1:35 p.m.

JOHN MOSLER, resumed the stand and testified further as follows:

Direct examination. (cont'd)

By Mr. Nolte:

Q. I think, Mr. Mosler, we were on the subject of bank vault doors and the question I should like to come to now is again the question of whether Mosler bank vault doors are unique from other bank vault doors mainly as to the Mosler name and reputation and service behind the door.

A. And I would add to that, design. The design. As far as physical resistance, I would say that all of these doors are beyond the point where that is an issue. In other words, the bankers are just not interested in that area today.

Now, if there is a wave of burglaries, this, of course, always activates interest in our business. But we have had no successful burglaries since the 1920s.

Q. So, for a period of 35 years or thereabouts, functionally, these doors have met the purpose?

A. Precisely, yes.

[fol. 731] Q. I believe Mr. Belasco stated in his testimony that Mosler bank vault door models were changed about every two years. Did you hear that?

A. Yes, I did and that is incorrect We basically changed the design of our door in 1953 and there has been no change of any importance since then. In other words, we, of course—many of these doors are made special by special trim, you know, this and that. That, we are excluding. But in talking of our major production, major items, these doors have not changed since 1953 and before 1953, there was a long period before they were changed. 1953 was a basic structural change.

Q. Addressing ourselves to 1953, the redesign then done—was that for purposes of function or appearance?

A. That was done for several reasons. One reason was that all doors before then or, let's say most of them, were made from castings, these tremendous castings, and it had

been our experience since the war that we were not getting the same quality castings as we were before the war and many of the castings that were coming in had air holes in them and had weaknesses in them which was almost impossible to find prior to manufacture and even with manufacture. Therefore, the basic structural change was a change [fol. 732] to a welded construction, which we felt was in every way a superior construction to the casting. The design change, of course, is obvious.

Q. Did your principal competitors make a similar change about that time?

A. Well, we caught them by surprise and they knew nothing of this until we introduced it at the American Bankers Convention and then it took them probably six or eight months before they changed their design.

Q. But since the six or eight months' lag was overcome, the doors are again similar?

A. Well, now it's a question—in other words, there are certain bankers, for instance, who prefer the Mosler Century and some the Diebold and some the Herring-Hall-Marvin door and so we have entered into an area of design choice, if you follow me.

Q. Since 1953, have design changes been made regularly for appearance purposes?

A. We have not changed the design of our doors since 1953.

Q. What would prompt a design change for appearance purposes?

A. Well, for instance, I'll give you a good example. The back of our door shows the boltwork of the door, which we felt was something that the general public liked to see. [fol. 733] Q. Under a glass?

A. A glass panel, and then you see the mechanism. Well, we felt this was an interesting, exciting thing to show in the door. That's our thought. We don't buy, we just build and there are many architects who do not like this. They regard our design as being a busy design and, therefore, we are coming out with a panel to cover the back in a very simple, stark simplicity.

In other words, basically, the design of our product, like any other product, is dictated by what people want to buy and when you talk about design, you never please everyone

with one design and, therefore, we have to have certain other small, you know, covering the back and that sort of thing. Basically, though——

Q. Is weight in any way a standard of classification in regard to bank vault doors?

A. No. I can clarify this for your information.

When we talk of a 3.5-inch door, a 7-inch, 10-inch, 16, 20 and so forth, that dimension refers specifically to solid thickness, as opposed to the overall thickness of the door.

For instance, a 10-inch door will have 10 inches of solid thickness and then behind that solid thickness will be the [fol. 734] mechanism of the door. And that is not regarded as a protection point of view.

Q. And the front is the hinge, handle, dials, et cetera?

A. That's right. Not significant in that 10-inch presentation.

Q. If weight is not a standard of classification, is weight a problem in the sale and installation of bank vault doors?

A. No.

Q. In the past ten years, to your knowledge, have any new companies come into the business of manufacturing bank vault doors?

A. Bank vault doors——

Q. In the United States, again.

A. Now, are you referring to other than what we were talking about before, somebody that made a bank vault door? Are you talking about a company engaged in the continuous manufacture of bank vault doors? I would say, to my knowledge, no.

Q. Did the——

A. In the United States.

Q. Did the York Safe Company at one time make bank vault doors?

A. Yes. They were considerable.

[fol. 735] Q. They were located in York, Pennsylvania, were they not?

A. Yes.

Q. To your knowledge, when did the York Company go out of the business of manufacturing bank vault——

A. The York Safe Company was owned and controlled by one man, who was a very dynamic and strong man. He died during the war.

Q. World War II?

A. Yes. And his firm was purchased by a group of speculators who milked the firm and then sold it off; made considerable amounts of money.

Mr. Kramer: I move to strike the answer on the grounds it was totally unresponsive.

Q. Then am I to understand that since the end of World War II or since the period of World War II when York went out of the bank vault door business, to your knowledge the principal makers of bank vault doors have been Diebold and your company?

Mr. Kramer: I object to the question, on the grounds that there has been no testimony that the York Safe Company went out of the bank vault door business at the end of World War II.

The Witness: Would you repeat the question?
[fol. 736] I am sorry.

By Mr. Nolte:

Q. Is it your testimony that during or about the time of World War II York Safe Company went out of the bank vault door business?

A. You want to remember, this is when I first came with the company and it is my recollection that the York Company, the factory was sold and the name was purchased, in approximately 1946, to the best of my recollection. It might have been 1947.

Q. Since that date, to your knowledge, have the bank vault door manufacturers, principal bank vault door manufacturers in the United States been your company, Diebold and HHM?

Mr. Kramer: I object on the grounds that the witness didn't give a date. He gave two dates. And the question is since that date. End of my objection.

A. Since that date, to my knowledge our competition is Herring-Hall, Diebold.

Q. Directing your attention, Mr. Mosler, to the thickness of the bank vault door, sometimes called the core, which

you described as solid, made up of sheets or plates of steel, will you describe for us——

[fol. 737] A. Would you like the exact description of the structure?

Q. Yes.

A. The structure consists of welded plates on the exterior periphery of approximately an inch in thickness, in which is placed a solid steel core. The solid steel core, this is our construction—I don't know anything about the others—the solid steel core is then milled out in the center area where all of the locking mechanism is and into that cavity are placed alternate layers of material to resist either drill or torch attack.

Q. Such materials as——

A. Well, such materials as copper resist torches. Special steels of special hardness can resist drill attack.

Q. Since the advent of your new door in 1953, has Mosler any longer built a door that did not contain plate steel?

A. Well, that's one of the unfortunate parts of our company policy and that is that we do. We still build on request doors which we regarded as being obsolete, so the answer to your question is yes. We build doors of various catalog—old catalog descriptions. Not in any sizable quantity.

[fol. 738] Q. Does Mosler also sell used doors, resell used doors?

A. Yes.

Q. Is that a sizeable part of your operation?

A. No.

Mr. Kramer: Objection, on the grounds that the word "sizable" is not sufficiently precise to permit an answer. If the witness already answered that question, I move to strike it.

Mr. Barton: He has.

By Mr. Nolte:

Q. To your knowledge, does Mosler have any customers other than banks which may use bank vault doors?

A. Yes. For instance——

Q. Can you name those?

A. We sold jewelers right here in New York, Fabrikant, one of the doors for his use. We have sold furriers a door for their use. We have sold doors, strangely enough, to individuals, bank vault doors to individuals for their private storage. We sell bank vault doors to Brinks, Inc., for instance, who use them for the storage of money the same as a bank. Insurance companies are very good. Those are sizable categories—insurance companies.
[fol. 739] Insurance companies buy large vaults.

We sell—bank vault doors are sold wherever there is a large concentration of valuables. Savings and loans, of course.

Q. What do you mean by the word "valuable"?

A. For example, a savings and loan, which is a good example. Many of them are very small and they keep $5000 and $10,000 in cash and will not have a bank vault door. Then there are other savings and loans where they have safe deposit box facilities or where they keep sizable amounts of cash, a couple of hundred thousand dollars, and in these cases they are prone to buy bank vault doors for their protection.

Q. To what extent will the bank vault door installed in an ordinary bank vault protect against fire?

A. There have been instances—let me say this—the bank vault door has never been tested for resistance against fire. There have been instances as recently as a few months ago, a bank burned down in Montana, burned to the ground. The interior contents were completely protected. We tested a bank vault against the atomic bomb in Nevada, above-ground. With the tremendous dynamic pressure, the heat temperature, the temperature inside the bank vault only rose 1°. Therefore, whereas there is no scientific
[fol. 740] measurement, as there is with insulated safes, to the resistance of the doors to fire, there is an historical value where they have gone through fires and protected the contents.

Q. Is Mosler's market for bank vault doors limited to any particular geographical area of the United —?

A. No.

Q. Is there any concentration of demand for bank vault doors in any particular area?

A. Well, it varies. In other words, here in New York

State. They change the banking laws, there is an immediate upsurge of demand. New England area has been slow in the last few years. It's been our experience that there is a geography to our sales, depending on local conditions.

In other words, one area might be very quiet for two years and then all of a sudden there might be a surge of activity. So that our business is a continued contact with all the banks in the United States. We are there and not the bank and are ready to serve them.

Q. How many branch offices for the sale of bank vaults are there?

A. Approximately 35.

Q. And without going into where they are located, [fol. 741] they are spread throughout the United States?

A. Yes.

Q. Approximately how many salesmen work out of the branch offices?

A. That, I don't have that figure, offhand.

Q. Can you give us a fair estimate?

A. I would say a hundred.

Q. Do these men sell in addition to bank vault doors the other bank equipment products that we went over in the prior testimony?

A. That's correct.

Q. Does Mosler sell any of its bank vault doors to others for resale? Or, let me put it another way, are Mosler bank vault door sales made to the users directly by Mosler?

A. Yes.

Q. Any exceptions to that of which you know?

A. Well, there have been exceptions. In other words, we like to feel in our company that we have no inflexible rules and where we can, we have an opportunity to sell the job. If there is some unusual circumstance, we will meet that circumstance.

Q. What, in terms of your experience, is the importance of the Mosler salesmen in connection with the sale of [fol. 742] the bank vault door?

A. Tremendous. This is it, I would say, to a great extent, the causative part of the sale is the salesman. In other words, in areas where we have outstanding salesmen we do an outstanding volume of business.

In certain areas, we have weak salesmen, and then when

things go up, we don't do our proportionate share. The salesman is a vital factor.

Q. What makes a salesman a good salesman of bank vault doors?

A. That's a good question.

Q. Maybe too good.

A. That's a dilly, because it is something that we spend a tremendous amount of time trying to develop. I can't answer that. We have one fellow who was in the cloak and suit business who is an outstanding salesman for us. We have a group of men who were engineers and were the complete opposite type, who are outstanding salesmen.

Q. That is before they were bank vault door salesmen. Does contact with bankers have an influence?

A. Yes. Very, very great influence.

Q. Influential contacts with bankers?

A. That has definitely been an influence.

Q. Any other factors?

[fol. 743] A. Personal relationships, for instance, where the salesman plays golf with the bankers, many of the salesmen visit the small town and stay with the bankers. Of course, it's optimum business. It's our goal. This is what we want.

Q. Do any bank vault salesmen operate from a headquarters as distinguished from branch offices?

A. In Hamilton, Ohio, we have one of the branches which covers a region around Hamilton, Ohio. But those salesmen——

Q. Is that branch located in the factory?

A. Yes, in the factory.

Q. Excuse me. I interrupted you.

A. But the overall supervision of the salesmen comes from the regional headquarters, either Chicago or New York. In other words, this is just another branch with four salesmen working out of it. That's all.

Q. Has this pattern of sales of bank vault doors through Mosler-employed salesmen been the pattern for, say, in the last ten years?

A. Yes, it's always been our pattern.

Q. To what extent are contacts with architects and contractors a factor in the sale of bank vault doors?

A. Well, the answer would depend on the job. In

[fol. 744] other words, there are certain jobs where the architect decides what the bank will buy and there are other jobs where the architect has nothing whatsoever to do with the purchase of the equipment.

In those cases where the architect is the decision mechanism of the sale, we concentrate on the architect and there are many instances where the architect says "This is what we will buy and that's the end of it" The bank says "I want nothing to do with this, and I will rely on my architect," and he makes the decision.

Q. Is the selling done to any extent on a competitive bid basis?

A. Some times, yes. I would say the greatest percentage of our sales are negotiated sales. In other words, a great percentage of times, we would put in a bid and subsequently the banker calls us in and says "Now, if your bid was $500 less, you would be right in line." Many of the sales are negotiated sales. Many of the sales are negotiated.

In other words, the friendly relationship between our salesman and the banker makes a negotiated sale and I would say that our constant goal is to get away from the business of just selling price, but we try to design the job so that when our bid comes in, we have a design [fol. 745] which is different than any competitor's design, different equipment and so forth, and we show the banker why our design was better. And if we are friendly enough with him, he leans our way.

Q. When you use the term "negotiated sales," you mean what by that?

A. I mean that we put in a bid and then after the bid is in, the banker calls us in and discusses the job with us and offers it to us at a certain price, which is my idea of negotiation. In other words, the bid is not that inflexible, you know.

Q. Is this without regard to competitive bidding?

A. Oh, no. In other words, they will have a competitive bid, but the banker takes the position quite often that they want to do business with Mosler and they will do business with Mosler at the same price, and they expect us to meet that price.

Q. You also said, I believe, Mr. Mosler, that negotiated sales represented by far the greater part——

A. Greater proportion.

Q. Of what order, would you say? In excess of 50 per cent?

A. I would say in excess of 50 per cent. I would say in excess of 50 per cent.

[fol. 746] Q. Can you be more specific than that?

A. No, I couldn't possibly, because I don't think that figure is—in other words, that figure would not be available. There would be no count of which jobs, of how we get these jobs. In other words, what we are concerned with is did we get the job or not and if we got it, we got it and I would have no—this is actually an educated guess on my part, of the percentage.

Q. Negotiated sales themselves, in your view, do not exclude the possibilities of other bids?

A. Oh, no. Sometimes, yes. In other words, there are many banks who will only deal with the Mosler Safe Company.

Q. Yes, but not necessarily yes. There might be other bids and then the price may not be the final factor?

A. That's right.

Q. Is the territory of each Mosler salesman an exclusive territory for that salesman?

A. To some extent, yes, there is a certain amount of duplication. I would say that overall, each salesman has a specific territory and is responsible for that territory. But there is a little overlapping. It's not—once again, flexible.

Q. Overlapping within a branch office?

[fol. 747] A. Yes, and then outside of a branch office.

For instance, to give an example, if, as happens, one of our men is on a very personal relationship with the president of a certain bank and then he moves 50 miles into somebody else's territory and he has another bank, if it's going to help us get the sale for this salesman to follow the president of the bank, he will follow the president of that bank, so we are not that inflexible.

Q. For how long has the Herman Safe Company represented Mosler?

A. Since about October of last year.

Q. And in what territory does it represent Mosler?

A. The northern part of California, Nevada—northern part of California and Nevada.

Q. Do Mosler salesmen directly employed by Mosler also operate in that territory?

A. No.

Q. With respect to what products and services does Herman represent Mosler?

A. They represent—they represent us in the area that they service. Completely. They represent our Service Division, our Alarm Division, our Commercial Division and the Bank Division.

[fol. 748] Q. How did Mosler cover that particular territory which is now, we will say, Herman territory, prior to the arrangement with Herman?

A. We would never, we were very weak in that territory. That was one of our weakest territories, and we had actually another agent there, the American Safe Company. Then, prior to the advent of the Herman representation, the American Safe Company was one man and he wasn't feeling so well and so forth, and so we purchased the American Safe Company and that became our branch and he remained as our representative.

He was a very good man, but he was not well and he didn't get out and do the job; so we had very weak sales, I would say, in that territory. Very weak.

Q. How many salesmen does Herman have operating?

A. I am sorry, I don't know.

Q. Does Mosler have a branch office of its own in Los Angeles?

A. I was just trying to think here, because I am not sure whether we transferred Los Angeles to Herman or not. I would have to check that and let you know. I would not have that. I should know it, but I don't.

Q. How about Oregon and the State of Washington?

A. Oregon, we have our own branch office and they have [fol. 749] no relationship to Herman.

Q. And the State of Washington?

A. The Portland, Oregon office covers the States of Washington and Oregon.

Q. What proportion of Mosler's bank vault door sales are made within the categories of the standard thicknesses we mentioned?

A. Numerically or dollarwise?

Q. Either.

A. You see, there is quite a difference there. I would say that numerically, probably over 90 per cent. When you are talking about dollars, putting dollar tags on it, it varies year to year and there can be a tremendous sway.

For instance, if we sell as we sold the Royal Bank of Canada, three tremendous vaults, these doors become a factor in our dollar sales, even though there were only four doors. They still become a factor, the one job, and if we have three or four sizable jobs like that a year, it will affect the proportion dollarwise.

Q. When we talk about standard doors, we are talking about doors in the range from 1.5 inches to 16?

A. No. Well, yes. We regard as standard, I am reading as standard here 1.5 to 12. 16, 20 and 24, I would [fol. 750] regard as special.

Q. Special in what sense?

A. We usually, when you get to those size doors, you have different requirements. The bank will come in and they will say—it's usually a very sizable vault and for instance, they will want two buses to pass, you know, going in and out of the vault, Federal Reserve, one and two. Therefore, the size of the door, the width is much greater and when we get up to the 16-inch and bigger, we become very reasonable with bankers. They want this and that, we are very happy to do it for them. And usually they become special.

Q. Then, doors in the range size of thicknesses from 1.5 to 12 represent, in your opinion, the standard and that—those doors from a quantity standpoint—accounts for approximately 90 per cent?

A. Over 90 per cent.

Q. Over 90 per cent?

A. Yes.

Q. And on a dollar basis, it's your testimony that the relative proportions vary from year to year?

A. That's right.

Q. And may vary widely from time to time?

A. Yes. And the larger doors are sometimes made [fol. 751] waterproof or even atomic resistant.

Q. During the past ten years, to make this specific period

for Mr. Kramer's benefit, is it your experience that Diebold has sought to sell standard doors, 1.5-inch to 12 inches in thickness, in competition with Mosler?

A. Well, I believe so, yes. In other words, they would—the same market conditions I would think would apply to them as applies to us.

Mr. Kramer: Objection. I object to anything that the witness "would suppose" or "would think," and move that it be stricken.

Go ahead.

A. In other words, on jobs that we compete——

Mr. Barton: Wait for a question.

Q. Have you had in your experience knowledge of competition from Diebold with respect to the standard size doors?

A. Yes, absolutely. In other words, on a given job, if a 10-inch door is required, Diebold would have a 10-inch door that would compete with ours.

Q. And they would bid for that business?

A. Oh, yes.

Q. Directly?

A. Yes.

[fol. 752] Q. Throughout the country?

A. Yes.

Q. Year after year?

A. Yes.

Q. In a substantial number of sales situations according to your experience?

Mr. Kramer: I object to the question solely because it uses the word "substantial," which I submit is too vague to permit an answer.

By Mr Nolte:

Q. In most sales situations according to your experience?

A. Most being well over 50 per cent, yes.

Q. The former Herring-Hall-Marvin Safe Company, presently by the Herring-Hall-Marvin Division of Diebold, is it true, according to your experience, that that organization has in the past ten years bid at times against Mosler

in the sale of standard, again using your terminology, bank vault doors, 1.5 to 12 inches in thickness?

A. Yes.

Q. Throughout the country?

A. Spasmodically. I would say their coverage was much less than Diebold's coverage.

Q. Throughout the total period of ten years, would [fol. 753] it, according to your knowledge and experience, the HHM competition cover the country?

A. Not as great as Diebold's, but they certainly, broadly speaking, covered the country, yes.

Q. Can you use some examples of where they were strong and where they were weak?

A. For instance, in New York City here, they were very weak. In many of your bigger cities they were very weak.

Q. Well, New York City area covers how much territory, the city alone?

A. Covering the larger banks in New York, like the Chase and the Chemical and so forth.

In certain areas, for instance, certain areas in Ohio, they always did well. They did good business in Florida. Once again, it goes with salesmen.

Q. How about Chicago?

A. Chicago they were doing a fair business, in Chicago, not as much in Chicago proper again as outside.

Q. How about Cincinnati?

A. Cincinnati, I don't think they sold anything in Cincinnati, that I knew of. They probably did. But we would like to consider that as being fairly close to home. They sold more in Columbus. They sold some in [fol. 754] the Virginia area, did a fair job in Virginia.

Q. Atlanta?

A. Atlanta, yes, the south. Not too much in Atlanta. They were not too strong in Atlanta.

Q. Washington, D. C.?

A. Yes.

Q. Philadelphia?

A. Not too strong. Most jobs would not compete.

Q. Minneapolis?

A. Minneapolis is not our area. We are not cognizant of what happens up there. We do have little business up there.

Q. Kansas City?

A. Kansas City, they, I'd say that they were certainly in competition, yes, but not on every job or most jobs.

Q. St. Louis?

A. St. Louis, they were certainly competitive in St. Louis. San Francisco was their strongest location. They did practically all the business in northern California and practically all the business in Nevada.

Q. Los Angeles?

A. Los Angeles, not terribly strong, I would say. They did good business in San Diego.

Q. The northwest area—Oregon, Washington?

[fol. 755] A. Very little in the northwest. Very little. They did some business in Utah. They sold a big chain, the Eccles chain.

Q. Is Diebold's coverage of the country in the bank equipment field all-inclusive?

A. I would say yes. In other words, they compete nationwide, yes. Certain areas are stronger and other areas, they are weaker.

Q. Would you indicate some of the areas?

A. I think they are weaker in New York State, upper New York State. In West Virginia, in Philadelphia. I think we do the lion's share of the business here in New York City. Pittsburgh, they are weaker. In San Francisco, they are certainly weaker.

Q. Pardon me. Directing our attention now to bank equipment.

A. Yes San Francisco and Nevada, they are certainly weaker. Utah and Idaho, they certainly are. I should have started in one corner and covered it.

Q. Start again.

A. I think I covered it.

Q. New England?

A. They compete very well.

Q. Southeast?

[fol. 756] A. Southeast, yes.

Q. Southwest, say Dallas?

A. They do very well in Texas. Texas is a strong area of Diebold. Denver is a strong area for Diebold, Minneapolis, Cleveland, Detroit. Those are the strongest areas.

Q. St. Louis, Kansas City?

A. St. Louis, they do good in. Kansas City, they do, I'd say, fairly well in. What areas——

Q. San Francisco?

A. They do very poor.

Q. Los Angeles?

A. Los Angeles, they do a good volume business.

Q. And the northwest section?

A. Northwest they do considerably less than we do, but they are certainly there.

Q. We talked, Mr. Mosler, about vault doors and about the servicing. We were also talking about bank vaults as such. Mosler, I think, holds itself out as the largest builder of bank vaults in the world.

A. Safes and bank vaults.

Q. How about bank vaults?

A. There are no—this is an area of question. I think we are correct. We haven't been challenged on this [fol. 757] point.

Q. I am not challenging you.

A. No. I understand. And this is an advertising thing and we feel that this is correct and we are continuing to advertise it. We feel a combination of safes and bank vaults makes it correct.

In other words, if it was bank vaults alone, I wouldn't be as sound. But it's pretty close, I would say.

Q. Well, in addition to building the door, the bank vault door, and servicing the bank vault door, does Mosler regularly have anything to do with the construction or modification of the vault itself, which I understand is typically reinforced concrete?

A. The only area that we would enter in is the building of the steel lining inside the concrete. We do not touch the concrete at all. We do sell the ceiling plates, finished plates of all kinds. On request we will sell light fixtures, but just—we don't even like to do that. It's a service. You know—we don't like that. It's mirrors and anything, you know, that goes in the vault.

Q. Do you install—does Mosler undertake to install these components?

[fol. 758] A. Yes. We have installation crews which we call erection crews that install that.

Mr. Barton: Ex the concrete.

Q. You don't have anything to do with the construction of the concrete?

A. Nothing to do with it.

Our net assets, I might add, are larger than Diebold's. We can throw that into the pot.

Q. I show you, Mr. Mosler, a brochure which pictures and advertises a Century 10 bank vault door by Mosler and on the back of that brochure is the legend, "World's Largest Builders of Safes and Bank Vaults," and I am sure you are familiar with that.

A. Yes.

Q. In line with the questioning we have just had here, we would like to clear on the record, like it clear, the meaning of that term "bank vaults" as it appears in that legend.

A. Well, that's been part of the legend since the time I have been with the business and it's never been subject to any question one way or another.

Q. But are we correct in our understanding that that does not refer to the building of a bank vault from the ground up?

[fol. 759] A. No. It has nothing to do with concrete.

Q. It does not refer to the manufacture, sale and installation of bank vault doors, emergency doors, linings, alarm attachments——

A. No, not alarm. We do not—I would think that in our business where the alarm company is an accepted company, I guess it would be included. Actually, I mean this is not, as I said, in our industry—things are—it being a small industry, figures have never been bandied around in any way.

Q. Does it include linings?

A. Lining safes, wall safes for the home.

Q. Safe deposit boxes.

A. Yes.

Q. Lockers?

A. Yes.

Q. What does the term lay-up mean in reference to a bank vault door?

A. The lay-up of the door is the lay-up of the layers of

torch resisting and drill resisting metal in the areas that are protected by the build-up of layers.

Q. What is electric protection in reference to a bank vault door?

A. That is the alarm system which is either a propri- [fol. 760] etary system as we sell, or as covered by a central station as serviced by and supplied by Holmes Electric or ADT.

Q. Are Mosler bank vault doors so constructed as to be waterproof when closed?

A. On request. In other words, we will make any door which we sell waterproof for a charge.

Q. Extra charge?

A. Extra charge.

Mr. Barton: Are they airproof?

The Witness: To some extent, I guess.

Q. Are the different styles of cladding, in connection with bank vault doors——

Mr. Barton: I thought that was inside.

A. Actually, the word "cladding" refers to two different things. We sell what we call a cladded vault in which case it has reference to an integral box of steel, usually an inch and a half thick with no concrete around it at all, and this we call a cladded vault. The cladding, the word "cladding" also refers to the exterior cladding, decorative cladding surrounding the periphery of the door.

Mr. Barton: We are both right.

Q. Well, cladding on the exterior periphery, is that an extension of what is sometimes called the architrave?

[fol. 761] A. Yes.

Q. And the architrave in common parlance would be a frame, framing?

A. That's right. We call it an extended cladding or an extended architrave.

Q. Are there instances where Mosler sells bank vault doors, but does not install them?

A. Yes.

Q. In such instances, typically by whom are the doors then installed?

A. Well, they would be installed by the bank itself. Or by—yes, by the bank itself.

Q. Are there difficulties in this?

A. Yes. There is nothing more dangerous to my mind than the installation of a bank vault door. Certain banks, for instance, the Bank of America, have every bit as much experience in the installation of doors as we do. In the case of that, they are equipped to handle the installation, but the installation of a bank vault door is a very hazardous undertaking.

Q. And such an installation requires special skills, techniques and equipment?

A. Yes. Not equipment. Special skills and techniques.

[fol. 762] Q. Not special equipment?

A. It requires, you know, the usual heavy rigging equipment, but not special equipment.

Q. But requires——

A. Great skill.

Q. Men with special skill?

A. Yes.

Q. What are these special skills and techniques that are required?

A. Well, you take a door that weighs 15 tons, it comes in flat. You uncrate it and stand it on edge. You roll it into its opening. You hang it, and if the job is not done perfectly, you have what is known as a run in the door, where a slight imbalance will cause the door to swing open or it just won't open—one or the other—and so you have to, with the door installed, it's got to be in perfect balance and if it's not, it's a bad installation job.

Therefore, it takes great skill, because that last push, you know, just has to be just right to get it seated correctly, and once that's done, why then you have a good installation job.

When you are taking this amount of solid metal and standing it up and pushing it into a hole, any slip, [fol. 763] and a man is killed.

Q. Well, is this the same type of skill that is required in the manufacture and handling of the door in the plant?

A. Well, there are various skills required. In other words, when you manufacture a bank vault door, you need the same mechanical skills that you would need for anything else. I would not say that—I would say that it is no longer true as it was many years ago that we had

workmen in the plant and we said build us a bank vault door and they did it. Today we have mechanics that come in with a specific machine and job to do and a standard of performance and they do that job. And it is not that specialized inside the factory.

The erection is more specialized by far than the manufacture in the plant.

Q. Are erection skills the result of training or experience?

A. Years of training and experience, both.

Q. In connection with the installation matter again, to your knowledge are there companies specializing in the installation of bank vault doors, which companies, however, do not manufacture them?

A. There are a few local companies.

[fol. 764] Q. Can you——

A. There are no national companies that I know of. There are a few local companies who buy and sell used bank vault equipment and they erect bank vault doors.

Q. They could erect new doors?

A. They could erect any kind.

Q. Where are some of the companies located?

A. Well, there is one in St. Louis, Tobe-Mundy, I believe. There is one in Texas. There is—they are used dealers. After all, all over the country, I would say. They —you know, in the larger areas of the country.

Usually they are people of experience, usually not people deciding to go into business, but people in mechanical work with one of the major companies and branch out on their own and went into the used equipment business.

Q. Addressing ourselves now to emergency or escape doors, as distinguished from bank vault doors, are these doors, according to your knowledge and experience, similar in construction and purpose?

A. These are exact companion pieces. In other words, the purpose of the emergency door is twofold—the one purpose is an emergency second entrance into the [fol. 765] vault and the other, which is the real main reason, is as a ventilating hole for the vault, and the opening has got to have the exact strength of the main door.

In other words, any aperture in the vault must somehow

provide the equivalent protection that your entire box as a unit offers the same protection throughout?

Mr. Kramer: Is it big enough for a man to get in and out of?

The Witness: Yes. The frequent use, you will see the door open and inside the door a fan or air conditioning duct.

Mr. Barton: Can that be opened from the inside?

The Witness: Usually, no. But when you are locked in the vault, there is what we call the emergency vault ventilator, which is the emergency device which is used to feed somebody or give them air and talk to them and so forth.

By Mr. Nolte:

Q. But not to let them out?

A. No. It's a little bit of a hole. About this big (indicating).

Mr. Barton: How often does that happen?

The Witness: It happens often enough.

[fol. 766] Mr. Kramer: I understand you might get locked in for a whole weekend, from Friday to Monday.

The Witness: Yes.

By Mr. Nolte:

Q. What dictates the use of an emergency door in addition to a bank vault door?

A. I would say most of the time it's as a ventilating device. There is a great problem in a bank vault—air.

Q. What proportion of installations carry both, as distinguished from only a bank vault door?

A. I would say 30 per cent probably carry both.

Q. We are speaking now of emergency or escape doors with or without ventilator built in.

A. Less than 30 per cent, yes.

Q. In other words, by far the majority of bank vault installations have only the bank vault door?

A. That's correct. Only on larger installations will they have the emergency.

Mr. Barton: And then without the emergency, they have ventilation?

The Witness: Yes.
Mr. Barton: And the trap door.

By Mr. Nolte:

Q. What generally determines whether an emergency [fol. 767] door will be installed in addition to the bank vault door?

A. The size of the vault.

Q. The cost?

A. No. The size of the vault. The physical dimensions of the vault. As your vault is larger, you need more of an exchange of air. A small vault, you know, some of the vaults are very small, and you open the main door and you have plenty of exchange of air. That's enough. But in a large vault, you get very stale with the smelly air in the back and you have to have an exchange of air.

Q. What's the size range of Mosler's emergency doors?

A. Whatever size door the bank purchases, from 3.5 up, we will build a companion piece as an emergency door.

Q. Are those emergency doors in that size range standard with you as are the——

A. Yes.

Q. According to your knowledge and experience, what other companies in the United States make and sell these emergency doors?

A. The only company that would make the emergency [fol. 768] door would be the company that would make a bank vault door. The same companies that make the bank vault door, also make the emergency door.

Q. And the sales procedures and organization for emergency doors are, I take it, the same as for bank vault doors?

A. Yes. Emergency doors are really never sold. It's bought. It's a necessity. When it's needed for ventilation purposes, our salesman says you need an emergency door here. It's not——

Q. Well, a good leading question, again: it's a companion item?

A. Yes.

Mr. Barton: In certain cases.

Q. In certain cases?

A. In other words, the emergency door is bought——

Q. When the size and structure call for it?

A. Exactly. When needed.

Q. Let's turn to safe deposit boxes. In previous testimony I believe it was developed that Mosler makes and sells safe deposit boxes called modular boxes.

A. Yes.

Q. These are in standard sizes?

A. Yes.

[fol. 769] Q. Are those sizes the same as the safe deposit box sizes sold by Diebold?

A. I would think approximately the same. Because every bank requires a 3x5, 4x5, 5x5, 3x10, 5x10 standard size that they sell.

Mr. Kramer: I move to strike the first portion of the answer of the witness, which gives what he "thinks," on the grounds that we are only interested in the testimony that the witness knows.

By Mr. Nolte:

Q. Do you know?

A. Well, I haven't looked at a Diebold catalog in some time personally. I would say—I would say that yes, they would have to have the same sizes, yes.

Mr. Kramer: I object to that answer, on the grounds it calls—gives a conclusion rather than the facts.

Q. Have you seen a Diebold installation?

A. Yes, I have. And I have seen Diebold installations where they have 3x5, 4x5 and 5x5 and 5x10. Whether the modular sizes are the same or not, I don't know. This depends on our production. Our size might be a fraction off of there, which would not be significant. But we would be competitive, would have to be.

[fol. 770] Q. Would you explain further for us the meaning of the term "modular," as applied to your boxes?

A. Well, prior to the introduction of the modular section, we were making, for instance, a 3x5 box, 3-1/32, 3-3/32, so that the dimensions were impossible. We were making

boxes with single and double noses. Boxes with piano hinges and number plates and stamped numbers.

We were making a thousand various items of boxes, which was a lot of nonsense and, therefore, we decided that the only way that we could maintain a sensible, economic structure for safe deposit boxes, since banks can only sell safe deposit boxes for a certain amount of money, was to standardize on them. We couldn't make a thousand and one different variations which mostly came from the sales force and not the bank. Our salesman would want to dream up something. He had something he would like to sell and he would sell it. This was something not a requisite of the market.

We found that banks were susceptible in buying the boxes in modular sections. This was good from our point of view and theirs. Larger banks then had some reasonable flexibility between bank vaults.

We were able to deliver very much quicker and [fol. 771] from a productive point of view, we have been able to cut our costs substantially.

Q. In modular sections, various sizes of the boxes and the sections are multiples of one another?

A. That's right. In other words, we put a piece of steel in the machine and it's like spaghetti. Out comes the doors finished.

Formerly, we made one door at a time and this was killing us in today's economic labor rates and so forth.

Q. From what date does Mosler modular safe deposit box construction figure?

A. My father always wanted to do this and we started to do this back in about 1947 or 1948. And it's taken us a long time, mostly to educate our own sales force, where we started out with a 1-X and 2-X, 3-X section, and a something like a 3098-R section and those were the standard sections, and put them in on a shelf, so that we could ship them and this is gradually increasing.

Each year we sell a greater percentage of modular and a lesser percentage of special boxes. Special boxes are out of line.

[fol. 772] Q. You are familiar with the various sizes that go into the sections of Mosler modular boxes, to the usual sizes?

A. Yes.

Q. I show you a Diebold brochure, which relates to unitized safe deposit system, and ask you to examine that.

Mr. Nolte: Mark this Century 10 bank vault door brochure, Plaintiff's Exhibit 1 for identification.

(Century bank vault door brochure marked Plaintiff's Exhibit 1 for identification, as of this date.)

By Mr. Nolte:

Q. Do the box sizes, as listed in that brochure for Diebold, correspond with the box sizes of Mosler?

A. The box sizes definitely correspond. There is no question about that. The section sizes, I really don't know. Whether they use the same section size we do or not, this, I do not know. The box sizes are definitely the same. They are standard in the banking industry. This is what the banks buy. You see, you have 2x5, 3x5, 5x5.

Q. Let's take a section that has 3x5 boxes and taking only a hypothetical 50 such boxes, if the individual boxes of the [fol. 773] Diebold construction and the Mosler construction are the same size, then it would follow, would it not, that the section would be the same size?

A. Approximately, yes.

Mr. Nolte: May I have the Diebold safe deposit box brochure marked for identification as Plaintiff's Exhibit 2 and will you mark Herring-Hall-Marvin brochure on safe deposit boxes in standard sections as Plaintiff's Exhibit 3 for identification?

(Diebold safe deposit box brochure marked Plaintiff's Exhibit 2 for identification as of this date.)

(Herring-Hall-Marvin brochure on safe deposit boxes in standard sections marked Plaintiff's Exhibit 3 for identification as of this date.)

By Mr. Nolte:

Q. Would you please, Mr. Mosler, examine the Herring-Hall-Marvin brochure?

A. These boxes would have to be the same because from

the banks' point of view, they rent boxes which they rent for $6 a year, $8 a year, $10 a year.

Q. By size?

A. By size, so that the size of boxes would have to be the same. Whether the sections are the same or [fol. 774] not, I do not know.

Q. Would you again examine Plaintiff's Exhibit 2 and Plaintiff's Exhibit 3 for identification, noting that Diebold uses the term "unitized" and Herring-Hall "standardized" and Mosler uses "modular." From your examination of these brochures, do you conclude that those terms apply to various types of construction?

Mr. Kramer: Objection. I want to object to this question on the grounds that the witness has not been asked for the period of time, if he knows, during which the brochures, Exhibits 2 and 3 of the plaintiff for identification, were in effect.

In other words, we don't know if this is a current HHM or a current Diebold brochure or whether they were one year to ten years old or what.

Mr. Barton: You can prove this better than through this witness.

Mr. Nolte: I don't propose to do it now.

Mr. Barton: I was thinking that you could do it better than through the witness. I was thinking they stand for themselves. You can look at them and tell whether they are the same.

Q. You can tell whether the openings are the same or [fol. 775] whether there are other factors?

A. There are other factors. For instance, our boxes have a lock that is a 5700 lock. You can also apply to the sections 5900 locks, which are changeable key locks, so there are slight differences, certainly. But as far as the size of the box, it would have to be the same.

Q. The outside frame of the section might vary, might it not?

A. It might vary, but the main interest, though, of the section, things are suggested. Our main interest in producing these, as far as our company is concerned, is to produce standard doors and standard openings.

As far as the section is concerned, you can't do that much

machining on the sections to begin with. So that that is not—the significant standardization, as far as we are concerned, is in the boxes--the door. As far as the section is concerned, we still have to be—we will be reasonable on that, you know.

If this was our section here, we don't have all these sections, you know, on the shelf and if a banker wanted these two boxes in the center here, it would make no difference to us at all, really—no difference at all.

[fol. 776] We might, if we thought we could charge a little more for it, we might do it and, if not, we would accept it. But the main saving here is in the size of the door. That was as far as our company, our efforts in standardization is in the standardization of the door and the boxes inside.

As far as the section is concerned, this is for—you almost have to do that for illustrative purposes.

Q. If a banker came to you and said "I have ten sections of Diebold unitized boxes, I want to add ten sections," could you sell him ten sections of modular boxes of Mosler?

A. Yes. The only difficulty we would run into would be in matching the guard key. In other words, we have—we could do that—we match practically all guard keys, but the lock would be a slightly different lock than our standard lock. But we would match it. If the bank has 500—this happens often—if they have 500 and want 100 more, we will sell them to them, the 100.

Q. The modular box?

A. Yes. Because the size boxes, we still would be selling a 3x5 box. His only interest is do I have the same guard key.

Q. Suppose the bank has 100 sections of Diebold [fol. 777] boxes and wants to add 50 more and put new bond boxes in all sections?

A. Here is the complication you get into. You are talking about 100 sections. That is a lot of boxes.

Q. That's too many? All right, ten sections.

A. No, no, not at all. I don't know if you are interested in this, but you are interested in what you can find out about it.

For instance, you take a bank like the Chemical Bank. It would be very wrong for the Chemical Bank at this time to buy a safe deposit box from anyone other than our-

selves, at this time, and the reason is we have a record of every key cut on every box that the Chemical Bank has and for instance if they have 500 boxes in a vault, it's not—where they have that many boxes, they are in great danger of getting a duplication of keys.

When they continue to buy from us, when they continue to buy from us, they are assured of getting a progression of keys. We give them a progression.

In other words, our lock has a hundred some odd thousand different changes in it. So we can go through that entire progression of keys. In other words, when they buy another box from us, they get to checking back to see that there is no duplication of keys. This helps us [fol. 778] in maintaining the customer relations. And if, on the other hand, if the bank is mad at us, there is no reason to not buy from somebody else. But at least we have an edge if we have the knowledge of the key cuts.

Q. Is that the key to the whole safe deposit thing?

A. One of them.

Mr. Barton: That's the bank key.

Q. Let us come back to bond boxes. What you have said doesn't apply to all of them?

A. No. We can sell the bank the bond boxes for any box. The bond box is the—actually, the safe deposit box within. That's what you pull out, that's the box.

Q. Does Mosler make its own bond boxes?

A. We are presently, I believe, buying them outside. We, I imagine, will be making our own shortly.

Q. Where do you buy bond boxes?

A. Locally in Hamilton.

Q. From what company?

A. I forget the name of it. I am sorry. It's a small company there.

Q. Are bond boxes made throughout the country by numerous companies?

A. Anyone can make a bond box. In other words, a [fol. 779] bond box is made out of tin, you know, and it's just folded up and painted. And we could do it, too.

Q. Are bond boxes made out of aluminum today?

A. They can be made out of aluminum or tin or steel.

Q. But today Mosler does not make bond boxes?

A. I am not quite sure. We were right on the line of making them ourselves or not making them ourselves and whether we have gone over to making them ourselves. I don't think so. I am almost sure that we still buy outside.

Q. In terms of your knowledge and experience, is there any basic difference between the bond box you sell and the bond box Diebold sells?

A. Small differences.

Q. Such as?

A. They have round corners. We have square corners.

Q. How about HHM?

A. I'd say that the bond boxes are pretty much the same.

Q. Are bond boxes proportionately a major item in relation to safe deposit box sales?

A. No.

Q. A minor fraction?

A. Yes. A bond box will cost us less than a [fol. 780] dollar and the box will sell for $16.

Q. What is the average life of a bond box?

A. Depends on the usage. We don't get tremendous calls for replacement of bond boxes. I don't know why we don't, but we don't. It's a small part of our repair business, the purchase of new bond boxes.

Q. Is the company in Hamilton from which you buy bond boxes a company independent of Mosler?

A. Yes.

Q. If you know, does that company supply bond boxes to other——

A. I believe they used to supply to HHM as well as ourselves.

Q. Diebold?

A. I believe Diebold make their own.

I would like to clarify that. When I said the box costs less than a dollar, that I meant just the tin bond box part of the safe deposit box, and we don't manufacture the whole box for a dollar and sell it for $16.

Q. You are referring to the bond box?

A. Inside, yes.

Q. That is put in and taken out of the nest?

A. That's correct.

[fol. 781] Q. In terms of Mosler's business, does the mak-

ing and selling and installation of vault linings represent a substantial proportion in relation to total——

A. No. This is a declining business and it is a declining business. It is a small part of our operation.

Q. Why is that?

A. Because most banks would go to a straight concrete vault without the lining. To have a 10-rated vault, you can have either 27 inches of concrete or 18 inches of concrete and a half inch of lining. Since most of the time they are pouring the concrete anyhow, it doesn't cost them very much to pour the extra concrete at the same rate as where they had the lining. Where linings are sold where space is a factor or in certain cases where the cladded walls are sold.

Q. So metal linings are in many instances unnecessary?

A. Well, I wouldn't say that. In other words, we sell linings and the lining will do more than the protective part. It also squares up your vault, so that you have a better vault when you have a lining, without any question. But it has been a declining business.

Q. The making and installation of bank vault linings—does it involve any skills or procedures peculiar to the [fol. 782] maker of bank vault doors?

A. No.

Q. Local contractors could do it?

A. Yes. In other words, there have been instances where the local boiler shop has built the lining.

Q. Does that make you unhappy?

A. Extremely.

Q. From an aesthetic——

A. Every point of view. Usually, the bank is unhappy, too. Because they don't usually square it off. They throw in some used plate.

Q. Does the decline in the market for vault linings tie in with the trend toward larger sized bank vaults?

A. No.

Q. Any size vault may be lined or may not be lined?

A. Yes. There is no relationship.

Q. Does Mosler make its own bank vault ventilators?

A. Yes.

Q. I am distinguishing from the emergency door ventilator.

A. Well, what you are saying is does Mosler make an

emergency ventilator as opposed to an emergency door ventilation unit.

Q. Yes.

[fol. 783] A. We do manufacture our own emergency vault ventilators.

Q. Is the vault ventilator almost an invariable part of a bank vault installation?

A. Yes.

Mr. Barton: Isn't it required by law?

The Witness: No.

Q. Is the ventilator construction a substantial factor in relation to the entire vault situation?

A. No. The ventilator will sell for about $450 and the vault will sell, the entire vault will sell for, let's say, $18,000. If it's a small vault, for $12,000.

Q. Typically, what is the structure of the ventilator?

A. What a ventilator actually is, is that it is a plug, first of all, it's a hole from the exterior of the vault to the interior of the vault, which is not a direct hole, but is a—not a maze, it is not a direct line into the vault. Whereas, it is a direct passage into the vault.

The way it operates is that you have a plug which is operated from the inside of the vault and by turning a handle, you take the plug out of its seat and therefore give free access to air or to passage of food or water and communications.

[fol. 784] There is also a small fan unit which will draw air from the outside in, which does not ventilate the vault but merely gives emergency ventilation.

Q. That plug of which you speak is the only thing that makes the ventilator as protected as the rest of the vault?

A. That's right. First of all, you don't have a direct hole into the vault and, secondly, you have a plug which——

Q. Does the plug contain the layers of——

A. No. No more than the walls of the vault contain that.

Q. Now, let's turn to after-hours depositories. In terms of your knowledge and experience, do banks generally use these depositories?

A. Yes.

Q. When did after-hours depositories come into production?

A. It was long before 1946. When, I don't know exactly.

Q. What is the average cost of a depository installation?

A. I'd say approximately $3500, $4000. I am not quite sure of that price. I would have to check that [fol. 785] price Of course, it all depends—in other words, if you have a simple envelope depository, this is a relatively inexpensive thing. If you have a bag depository, simple, this is also. If you have an underwriter's approved bag and envelope depository, this is an expensive item.

Q. Anti-fishing, et cetera?

A. Yes. I would say $2500 to $3500, let's put it that way. Probably less than that. I should have the figure.

Q. Do these depositories figure in sales to consumers other than banks?

A. Yes.

Q. To what extent?

A. There are different types of depositories which are sold. Utilities buy depositories, trucking firms, where they collect money, buy depositories. Milk route people buy depositories.

Q. Are they all basically the same?

A. No. They vary. We have a complete range of products for depositories.

Mr. Kramer: Savings and loans?

The Witness: Yes. They would have no reason for a bag [fol. 786] depository. They only need an envelope.

Q. Do they all have a safety base?

A. No. They all have a security box at the base but for instance the depository firm of ours builds a dropository for utilities where there is only three or four hundred dollars collected, and the utility company doesn't want to spend two or three thousand dollars for a depository, and it's a very light metal unit.

Q. The base of the depository is a burglary resistive container of some description, is it not?

A. Well, this is—for instance, a utility saving unit is made of light metal construction, which has very little resistance.

Q. What purpose does it serve?

A. The whole basic philosophy of our business is that we sell protection and protection you buy what you need. If

you keep $300, for instance, it stands to reason that an expert safe-cracker is not going to risk his life to get the $300. Therefore, the man you are trying to resist is more or less a sneak thief or a kid and as long as he has to use some tools, this will keep him out effectively from the $300 units. We don't consider it to be a strong unit. Still it serves that purpose.

[fol. 787] If you keep a million dollars in cash, then you have to have real protection. Because the sneak thief doesn't attack it. You have a well-trained, well-organized gang try to break it and you need the maximum protection.

Q. Do banks buy maximum protection?

A. Most banks will buy an E-rated money safe as a safe-keeping unit, to be exact.

Q. Explain that, if you will.

A. An E-rated unit is rated by the insurance underwriters as carrying a mercantile E-insurance classification which means that it has a round door with an inch and a half solid thickness and a body with a wall one inch solid steel thickness. It carries no underwriters other than the underwriter's label on the lock.

Q. T-20?

A. No. T-10 is the relocking device. The T-20 label has relation to an insulated safe and it refers to the test given by the Underwriters Laboratories, which by attacking that, say, with certain specified tools and that safe resisting this particular attack for 20 minutes and it receives the T-20 label.

Then you have the T-10 label which is a label on the lock alone, which means that if the lock is driven [fol. 788] through, there is an automatic relocking device.

Q. How many different models of depositories does Mosler currently make?

A. I'd say at least twenty.

Q. How many for sale to banks?

A. I'd say at least six or seven.

Q. What proportion of Mosler depository sales, from a unit standpoint, are to banks?

A. Well, the unit which, the after-hours depository which we build for banks is sold almost exclusively to banks and the after-hours depositories that we sell to commercial establishments is not sold to banks. So the proportionate

numbers are not too significant, because a utility might buy 50 of the little boxes, they don't compare to 50 night safes.

Q. They are different animals?

A. Different animals.

Mr. Barton: In the light of the re-hash—I wonder whether you need Cronin after you go through the witnesses and get the detail that you are getting about this? After all, he has only six months of experience in the bank field; so that his degree of——

Mr. Nolte: He has been in the other field for a number of years.

[fol. 789] Mr. Barton: In commercial but not the banking field.

Mr. Nolte: We get to that, though.

Mr. Barton: Of course, you have a witness here who has been in both of them.

Mr. Kramer: You are going to cover both fields with this witness?

Mr. Nolte: Yes.

Mr. Barton: Well, then, why do you need Cronin? Why do you need them for the examinations to go over the same material, over and over?

Mr. Nolte: Could we make an arrangement whereby Mr. Cronin could come in—could we make an arrangement to examine him in the morning at least briefly and then have an arrangement to have Mr. Mosler return at a specified time?

Mr. Barton: I don't want to see the people just for repetitive examinations where you are getting basically the same information, except perhaps in little more detail or technical detail, to be tied up. I think there is a reasonable amount of discovery here, but I doubt whether the court has in mind permitting just a general cumulative amount of discovery from the same witness. Same, basically, [fol. 790] the same witnesses.

All I am doing is asking you whether you really think you need Cronin in light of the fact that you are going to have two witnesses from the marketing and advertising point of view and Mr. Mosler here.

Mr. Nolte: We do feel that we need to ask some questions of Mr. Cronin.

Mr. Kramer: In view of that, I have only one question to ask in an effort to help Mosler and no other purpose.

Would there be any advantage, if he insists on having Cronin, in having Cronin here at an hour certain and finishing him or would it be better in finishing this one?

The Witness: I would prefer to have Cronin at 10:00 o'clock and I would come in at noon.

Mr. Barton: No, I am hoping they won't waste two hours with him.

Mr. Nolte: Let's agree we will convene with Mr. Cronin at 10:00.

Mr. Barton: And try to go to Mosler at 11:00 o'clock.

[fol. 791] Mr. Nolte: Recess until 10:00 o'clock November 30, 1960.

(Whereupon, at 4:00 p.m. an adjournment was taken to November 30, 1960, at 10:00 a.m.)

[fol. 792] JOHN MOSLER, resumed the stand and testified further as follows:

The Witness: Mr. Cronin stated that Mosler manufactures a non-insulated file. This is technically correct. However, the non-insulated file which we manufacture is a highly specialized file for resistance to surreptitious entry and it is sold for the protection of classified records, so it is a security file.

I don't know whether that is important or not.

Mr. Nolte: It is important. It is entirely uninsulated?

The Witness: It is entirely uninsulated, but it would fall —where the ordinary non-insulated file would be a hazard, this would be considered a security cabinet.

Direct examination (cont'd).

By Mr. Nolte:

Q. Does a security file of that sort bear any relationship to a record safe that has some burglary protection or does it go beyond that?

A. The entire purpose of this file is to prevent surrepti-

tious entry. In other words, the file can be burglarized and repaired on the spot.

[fol. 793] Q. The evidence of attack will remain?

A. That's right. There are many instances where the burglary itself is unimportant, but knowledge that these papers have been burglarized is extremely important and that is the purpose of the file.

Q. Who wants a file such as this, other than the government?

A. Well, the defense-supported industries.

Q. Defense contractors?

A. That's right.

Q. Mr. Mosler, I think we were talking yesterday during your testimony about night depository and dropositories and I got into some bit of confusion between the two. I would like to go back to it. A night or after-hours depository, as I understand it, is chiefly a product in which banks are interested; is that correct?

A. No.

Q. What other customers are interested in a night depository?

A. Any organization which receives money after hours.

Q. I thought you were making a distinction between the depository and a dropository?

A. There is. The distinction—you know, the general terminology for a broad range of products are after-hours [fol. 794] or night depositories and these would apply to the use that afford much less protection as to units that would afford a much greater protection. In that range there is a group of—some are built with banks in mind, some with drive-in depositories in mind and others with utilities and others with dairies. So the phrase "after-hours night depository" covers the broad range of specialized products.

Now, the dropository is an after-hours depository or a night depository. That is a specialized unit for the utility field and it is also used by savings and loans.

For instance, if a bank wanted to put in a dropository, they could put it in. If a dairy wanted to put in a bank-type unit, they can and it would serve the purpose because both of these units could receive money and then contain it with relative degrees of security.

Q. You use the term "dropository" as a trademark term in connection with the products of your Dropository Division?

A. No, Dropository Corporation.

Q. It is a plant separate and apart from your Hamilton plant?

A. A separate company.

[fol. 795] Q. Which is The Mosler Company?

A. Yes.

Q. How long have you had this dropository development?

A. We bought the company about two years ago.

Q. It is the purpose of the Dropository Company to expand this idea of after-hours or night depositories to additional uses in the field?

A. Exactly. The Dropository Corporation was manufacturing products which we didn't manufacture. For instance, they also make a dropository for books for a library where you deposit your books and this brought us into the light metal dropository lines including letter slots, in which we have never been involved before.

Mr. Nolte: Mr. Reporter, will you mark this brochure Plaintiff's Exhibit 4 for identification?

(Brochure marked Plaintiff's Exhibit 4 for identification, as of this date.)

By Mr. Nolte:

Q. Would you look at this brochure and give us the date when that was published? I would like to know whether it is current.

A. This is a current catalog. The date, I would [fol. 796] think would be about two years ago, but it is a current catalog.

Q. Does that catalog give a near complete illustration of the Dropository products?

A. Yes.

Q. Is it true that the dropositories made in this Dropository Company and the after-hours night depositories made by Mosler in Hamilton have in common structurally a safe or chest of some burglary resistive qualities at the base?

A. The concept of the two units is the same. The industry terminology would be that in the bank type night depository there is a money safe in the receiving units, in the dropository there is a light locker as a receiving unit.

Q. The latter having relatively no burglary resistance?

A. That's right.

Q. Of those bases used for dropositories on the one hand and night depositories on the other, is there a range similar to that in which you find in safes and money safes all the way from a key lock box up to a rather heavy and effective burglary resistive money safe? I am talking in a general range.

[fol. 797] A. As I understand the question correctly, what you are asking is the range from the light locker to the money safe compared to a range in the insulated and burglary system.

Q. No, burglary resistive safes and chests.

A. The answer is no, because this is the lightest unit which we sell for the protection of money.

Q. Do some of your competitors make lighter money chests or safes than you do? I mean if I were to walk into an office supply house——

A. Yes, you can buy—this then leaves the safe industry and goes over into the office furniture industry, that type of light locker. In other words, you would find this light locker manufactured by Cold Steel Equipment rather than Mosler Safe Company.

Q. Because it is a light metal construction?

A. Yes, without any real security.

Q. But the basic notion again of the depository or the dropository is the facility for dropping an envelope or a package in without opening the base and then later to have access to the base by a key?

A. That's right, and that concept is proven by the fact that the dropository is sold presently to savings and loans and the after-hours bank depositories are also sold [fol. 798] for the same purpose to savings and loans, so they both fulfill the same purpose, with varying degrees of security.

Q. Might banks have dropositories in lobbies to save customers time during business hours?

A. They certainly could.

Q. It is not yet in effect?

A. They don't, but they could.

Q. Now, burglary resistive safes and chests as we just now touched on, what range of products in that line does Mosler make from the standpoint of burglary resistive products?

A. We make burglary—our company calls this unit a money safe, other companies call it a money chest, so when I say money chest, I refer to money safe.

Q. Diebold might call it a cash safe?

A. Yes. We manufacture in varying sizes round or money safes in several qualities, we manufacture the E type unit, which is a unit with an inch and a half door, a one-inch body, which is non-case-hardened.

We manufacture an H-type unit, which is exactly the same as an E-type unit with a completely case-hardened body.

We manufacture an X-60 unit, which is the same as the E-type unit, with the exception that the body is [fol. 799] an inch and a half thick, it is case-hardened. It is tested for door fit and it is tested against explosive attacks by the Underwriters Laboratories. Neither the A or H unit is tested by the Underwriters, except as pertaining to locks. Then we make a TR-60 which has reference to A-units which has resistance to a torch attack and labeled by the Underwriters and we make a TX unit which is resistive to torch and explosive attacks.

Then we make a TL-30, which has reference to a unit which will resist tools and torch for this specific test. In other words, the TR-60, the TX-60, the TL-30, the TR-30, all of these terms apply to specific tests run by the Underwriters Laboratories and then the unit is under continuous inspection by the Underwriters to assure that the standard is the same. Then we make one other unit that I would classify in this burglary resistive unit which could also be classified in the fire-resistive category. We manufacture a wall safe with a square door one inch thick and the bottom one inch thick. The lighter safe, I would classify in the insulated.

Q. They both have insulation?

A. Yes. Then in the commercial burglary-resistive line

we also manufacture a merchandise door, a thickness either three inches or one and a half inches.

[fol. 800] Q. This is a greater burglary-resistive door below the order of a bank door?

A. That is correct. This is used by and for the protection of merchandise, as the name implies.

Q. Do you mean fur vaults?

A. No. It has been used for fur vaults, but most fur vault doors are insulated doors. Behind the insulated door you have a thermostatic door. There are furriers who use merchandise doors. Other furriers use bank vault doors. The merchandise door was sold in considerable quantities to stockbrokers.

Q. Products in that line, are they sold by Mosler throughout the United States?

A. They are.

Q. Through the Commercial Division in Mosler?

A. Yes, and also through the Bank Division.

Q. Is it possible for you to draw any line in this product group between the Bank Division and the Commercial Division sales?

A. They are sold by both divisions. Both divisions——

Q. Both divisions sell the entire line?

A. Yes. The only division between divisions, as far as product is concerned, is that the highly technical products of the Bank Division are restricted from sale [fol. 801] by commercial salesmen.

Q. Who would you say are your chief competitors throughout the United States in reference to product line?

Mr. Kramer: Objection.

A. Diebold, Herring-Hall-Marvin Division of Diebold, Gary Safe Company, Schwab, Meilink, Murphy, I believe makes one, Guardian makes one, Gross-Feible makes one. Then on the West Coast there are several manufacturers. There is a whole group of manufacturers in these units. There is the Johnson Safe Company, there is the Inter-Floor Safe Company. Those, I think, cover about the range of manufacturers.

Q. How many of these companies compete in this line of products with Mosler's entire line?

A. None. Mosler Safe Company is the only safe company that has a TX-60 unit.

Q. Does any one or more of these companies come near Mosler?

Mr. Kramer: Objection, on the ground that the question is too vague. "Come near" is not a word.

Mr. Nolte: Proceed.

A. Up until two, three months ago with the introduc- [fol. 802] tion of the TL-30 money safes labeled by the Underwriters Laboratories. Prior to that time approximately 80 per cent of the safes sold were the E classification which were manufactured by all of these companies.

Now, some of these smaller ones have the range of sizes. But in this particular line that is not significant, because all of these could make any size on demand. That is your answer, I believe.

Q. Now, turning to drive-in and walk-up windows, Mr. Mosler——

A. Yes.

Q. (continuing) —from what date has the manufacture of this product been existing?

A. I can't answer the exact date, but we have been selling them since the 1920s.

Q. Mr. Belasco indicated that this product was one currently emphasized for advertising.

A. That's correct.

Q. There is an active market interest for advertising?

A. That's correct.

Q. On the basis of your knowledge and experience, what is your premise as to why that marketing——

A. The drive-in window is now part of any bank. They can put it in. It is a requisite. Very few banks [fol. 803] will go today where they can put in a drive-in window and not put it in.

Q. Is this similar to the trend towards night depositories quite some years ago?

A. Yes.

Q. Drive-in windows represent a package unit construction, do they not?

A. Yes.

Q. Could you describe a typical drive-in window so that

we might understand what goes into it in terms of Mosler manufacturing?

A. The drive-in windows consist of a buck, then there is a window made of bullet-resistant glass fitted into a frame over which is a stainless steel canopy, with or without a light, under which is a counter, in the center of which is a receiving tray which extends out to a car and which, when one part of the tray is open, the other side is closed so there is never a continuous access from street to bank, which is also made bullet-resistant. Then there is a counter in which are cashier drawers.

Q. Does the under-counter setup usually contain the teller's buses?

A. It can. It is the option of the bank whether they want a molded unit there or they want a fully [fol. 804] stationary unit.

Q. Do money safes go into these counters?

A. Quite often they do. They may operate the drive-in window after the bank is closed and the reserve supply of money is put away.

Q. Does Mosler manufacture drive-in windows and make all component parts?

A. No. We make the bullet-resistant parts.

Q. Do you manufacture the buses?

A. No, we don't manufacture buses. We therefore sell buses manufactured by someone else.

Q. Do you make and install the electrical devices?

A. I am sorry, we don't manufacture the speaker system. We purchase that. Nor, of course, do we manufacture any of the electrical lighting fixtures.

Q. How about the motors and controls that regulate the equipment?

A. We don't manufacture the motor, but we manufacture the activating pieces that are put on the motor.

Q. Is a drive-in window a relatively expensive item of equipment?

Mr. Kramer: Objection.

Mr. Nolte: I will rephrase the question.

Q. Could you give us some idea of the average cost?

[fol. 805] A. Anywhere between $2400 and $3200. They

can be more expensive. The average price, I would say, is about $2600.

Q. If you can, give us an idea of the portion of the annual sales volume in drive-in windows to that of your Bank Equipment Division.

Mr. Barton: Off the record.

(Discussion off the record.)

A. It is an important part of our bank line. I would rather not give any percentages or any figures which would be helpful to competition at this meeting. This is in the category of the lesser—I am not all that familiar on this particular point, I would rather not give you an approximation at this time.

Q. We will pass that for the present.

A. Thank you.

Q. Now we come to book or storage vault doors. The insulated doors—what is the makeup of Mosler's line of products here? Are there a wide variety of sizes and thicknesses, et cetera?

A. We manufacture doors, fire-resistant or bank vault doors as prescribed by the test by the Underwriters Laboratories covering the following test: The FS 32 half-hour door, the one hour, the two-hour, the four-hour and the [fol. 806] six-hour. We make all these doors with right and left hand combinations.

Q. Do you manufacture double doors?

A. We have manufactured double doors, but it has been a spasmodic thing. We don't now.

Q. You confine your line of these products, then, to Underwriters' labeled products?

A. Yes.

Q. These doors manufactured by Mosler are sold throughout the United States?

A. Yes.

Q. Through the Commercial Division?

A. Yes.

Q. Through dealers and distributors as well?

A. Through dealers.

Q. Not distributors?

A. One distributor on the West Coast.

Q. Could you give us a fair estimate overall as the percentage of dealers' sales as against the percentage of Mosler's own sales?

A. I'm sorry, I don't know.

Mr. Kramer: Off the record.

(Discussion off the record.)

Q. Now we come to insulated safes. Would you [fol. 807] describe the Mosler line of these products?

A. We manufacture, first of all, wall safes for the home which are non-labeled. Then we manufacture insulated safes from a size 16x12x12 up to a size 60x41x30 in three different classifications. In the one-hour Underwriters Laboratory testing safe, the two-hour and the four-hour. We also manufacture church poor boxes.

Q. Are they insulated?

A. Some of them are. Then we have our Systems Division, where we sell rotary card files.

Q. These rotary mechanisms are enclosed in insulated cabinets?

A. No. That is non-insulated.

Q. Do you want to correct the poor boxes, also?

A. They are non-insulated. That is it.

Q. I must go back for a moment to book vault doors, because I forgot one thing. Would you give us the competitors you have throughout the country in the book vault product line?

A. Book vault doors are sold by Diebold, Herring-Hall-Marvin Division of Diebold, by Schwab, by Meilink, R. C. Allen has a book vault door—they don't manufacture—Remington-Rand, I believe, sells a book vault door, and that is it.

[fol. 808] Q. Do any of these people make a line as complete as yours?

A. Anyone who sells the doors would have a complete line.

Q. Now again the insulated safes on the line which you just described, these you sell throughout the United States?

A. Yes.

Q. Through your Commercial Division?

A. Yes.

Q. Through dealers, also?

A. Yes.

Q. Through the distributors?

A. One distributor—through distributors.

Q. More than one?

A. Yes.

Q. Are the distributors located throughout the country?

A. Yes. We have the Protectall brand, Protectall Division who sell to distributors as well as sales under the Sears Roebuck brand name and under various brand names.

Q. Would you name your principal competitors in this line of insulated safe products?

[fol. 809] A. Diebold, Inc., Herring-Hall-Marvin, Meilink, Schwab, Murphy Manufacturing Company make an insulated file, Brush-Pennett Safe Company makes a small safe, three sizes. There are countless manufacturers of small insulated units for the home, non-labeled. Remington-Rand, Shaw-Walker, I believe that's it.

Mr. Kramer: Off the record.

(Discussion off the record.)

Q. Do you use the terminology "insulated safes" and "insulated files" interchangeably?

A. We use the terminology "insulated products," our Fire-Resistant Division, and this covers the files.

Q. The list of companies which you just gave, was that a list of companies which, according to your knowledge, sell this product line?

A. No, they are groups of companies that manufacture.

Q. As I recall from the companies you gave, there are a substantial number of more manufacturers of insulated safes than insulated vault doors. Is there anything in the way of technology of production that accounts for this?

A. All you need would be a brake with a longer throw—all you need would be a press brake with a longer die; that is all. The same insulation would go into both [fol. 810] products.

Q. Nothing peculiar about the hanging of the vault doors?

A. Nothing. We don't use the installed fire-resistant doors. Anyone can install them.

Q. The fire-resistant door, from the installation standpoint, does it carry with it bank vault doors?

A. No.

Mr. Kramer: May I ask one question?

Mr. Nolte: Yes.

Mr. Kramer: You list Murphy as a company making insulated safes?

The Witness: Insulated files. It is actually the Murphy Elevator Company, strangely enough.

Mr. Nolte: I think it has a separate name now.

The Witness: I don't know.

(Whereupon, at 12:05 p.m., a luncheon recess was taken until 2:30 p.m.)

[fol. 811] Afternoon Session
2:30 p.m.

JOHN MOSLER, resumed the stand and testified further as follows:

Direct examination. (cont'd)

By Mr. Nolte:

Q. Mr. Mosler, we were on the subject of insulated safes and by way of further explanation, insulated safes carry with them various interior fittings, could you give us some idea of Mosler's line of products?

A. There are three small sizes of insulated safes which have standard fixed interiors. Then the size is larger than this very adjustable shelf and on those shelves are placed interiors which are mostly standard interiors designed to efficiently house such records as 3x5 cards or ledger cards or document files, cash drawers and the safe, therefore, having been sold empty, is then tailored to individual needs by the placement to correct the interior in size.

Q. Is it possible to put an uninsulated file in a large safe?

A. Yes. In other words, we have what is known as an insulated record container which differs from an insulated [fol. 812] file in that it is actually a safe. Then in all of our safes we do put in or can put in, subject to the requirement of the customers, cap-size or letter-size files.

Q. Are money chests sometimes installed?

A. Yes, quite often.

Q. If an uninsulated file may be installed in an insulated

safe, why is the insulated file a separate line from insulated safes?

A. Well, the insulated file is much more limited, as far as flexibility is concerned, than a safe. The insulated file carries, in our line, a maximum degree of protection of one hour The unit, itself, even in the one-hour, it's the same as, let's say, two students passing a test—one might get a 90 mark and the other might get just a passing mark of 70. The insulated file gives less protection than a C-labeled safe in our line. The insulated file is built primarily with light weight in mind. The reason for that is that they are put back-to-back, they are put in batteries.

An insulated file carries almost no burglary protection, whereas, the safe that would have the T-20, the combination mark is optional. The price per filing inch of uninsulated file is less than the price per filing inch of an insulated safe.

[fol. 813] Q. Now we have ledger desk safe in the Mosler line. As I understand, they are handled in the Bank Division as well as in the Commercial Division.

A. Yes.

Q. Would you describe your line of ledger desk safes?

A. These ledger desk safes have swinging doors which recede and slide into the side of the safe. Inside they usually have a sliding shelf which extends on suspensions on which are placed usually ledger cards.

Then riding on top of this ledger card file is a desk shelf which also slides. Then, for instance, in the typical savings and loan installation you will have signature cards on the top, below that ledger cards and below that mortgage file and probably a money safe for cash protection.

These are sold also to credit unions and that type of installation. They have also been sold to department stores as well as banking institutions.

Q. Banks do use them?

A. Yes.

Q. You have mentioned that some fire-resistant products, for instance insulated files, don't carry as much burglary-resistance as an insulated safe, for example.

A. Yes.

[fol. 814] Q. As a technical matter, are there problems that make burglary protection and fire protection some-

what mutually exclusive? I mean can you achieve both in one product only to a limited degree?

A. Well, in our business the protection is tailored to the need. For instance, if someone needs both fire and burglary protection, a safe with a money safe inside gives protection against both.

The insulated file is strictly for fire protection and also for some protection against unwarranted entry. Does that answer your question?

Q. Yes.

In the field of insulated files, you market those only through your Commercial Division; is that correct?

A. No, that is incorrect. We market the insulated files in both divisions, because the banks, after all, have great need for record protection. We sell insulated files to banks both through our Bank Division—we also have certain men in our Commercial Division who are specialized in these for banks—and we also sell the insulated files through dealers to banks.

Q. You sell insulated files through your branch offices throughout the United States?

A. That's right. We have 15 branch offices—17 branch [fol. 815] offices where we handle direct sales.

Q. These are Commercial Division products including insulated files?

A. That's right.

Q. In the sale of insulated files, could you name your principal competitors in the United States?

A. As far as manufacture or sale?

Q. Let's start with manufacture.

A. Remington-Rand, Shaw-Walker, Meilink, Murphy, Schwab. Those are your manufacturers.

Q. Now, if you will list those competing with you in the sale of these products.

A. Diebold. I am not quite sure whether the Herring-Hall Division is still making those. I know that Diebold doesn't manufacture their files. Again, Fireproofing & Company, Metal Office Furniture Company, I believe Sears Roebuck sells files

Mr. Kramer: Sells insulated files?

The Witness: Yes. There are many, many sources of distribution of these files.

Q. According to your knowledge and information, has the market for insulated files throughout the United States been an expanding market in the last four or five years? [fol. 816] A. Declining.

Q. Insulated files?

A. Yes.

Q. Has that declined uniformly throughout the country?

A. It is uniform. It is not an expanding field. As more and more records are consolidated—in other words, each of these IBMs sold would consolidate a great group of those records and the large markets of these files are dried up. The large insurance company would no longer go into the files to the extent they used to. I wouldn't say the decline is of a tremendous nature. It is as far as the government is concerned. The government was the biggest purchaser of these files, but it certainly has been a serious decline.

Q. From what period of time would you mark that decline?

A. I'd say within the last five years, since Korea.

Q. Within the last five years?

A. Yes.

Q. In any area or areas of the country are local laws controlling branch banking a factor in your business?

A. Very definitely.

Q. Could you name such areas where, for instance, [fol. 817] restrictions in branch banking would affect the market?

A. The State of Illinois allows no branch banking at all. This, of course, affects our business because there are many fewer banking offices than there would be if there were branch banks.

The State of California allows unlimited branch banking almost and this also affects our business in that it puts a single customer in a very strong position as far as purchasing is concerned. In other words, if one bank is going to buy 50 bank vaults from us, they are in a position to ask for more than a bank that is just going to buy one.

Then you have your states like New York State, where

there is branch banking, but there is limited branch banking and we saw here in New York a change in the branch banking, a loosening of it and we immediately felt a serious upsurge of business in the United States.

So those are the three points there.

Q. In Chicago, Illinois, with the problem of increasing of branch banking, are there substitutions which would provide you with some sort of market, for instance, check-cashing?

A. We don't regard currency exchanges as that. Savings and loans, yes.

[fol. 818] Q. These installations are across the streets from large companies and so on?

A. That is the sale of a safe, but not a sizable thing.

Q. As far as the Bank Division is concerned, in the last four or five years has the total markup throughout the United States for products from that division been growing or declining?

A. In the last five years the bank market——

Mr. Kramer: That is totally irrelevant. Do you mean the market for bank equipment?

Mr. Nolte: The products for Mosler Bank Division.

Mr. Kramer: No objection.

The Witness: There has been a growth in demand, in the overall of the last five years, yes. There is also a constancy of the basic problem of our industry. It is that once the demand is filled, there is nothing we can do to promote the sale of bank vaults.

In other words, once the bank decides they are not going to build a branch, that is the end of our sales. The sales of our business are historically of very great peaks and very deep valleys.

[fol. 819] By Mr. Nolte:

Q. I take it you are addressing yourself there to the bank vault door business?

A. No. Everything goes along with it.

Q. All other products in the Bank Division?

A. The answer to that is we will always sell a certain number of them. For instance, if no bank puts up a branch, we will sell some safe deposit boxes, whether it be a small

percentage of what we sell, because most of our sales go for new installations.

Mr. Kramer: You say "we sometimes." Do you mean Mosler or the industries of which you speak?

The Witness: I mean the industries.

By Mr. Nolte:

Q. Would you say in terms of your knowledge and experience that the market throughout the United States for the products of Mosler's Bank Division has reached a point of saturation during the last four or five years?

A. No. I don't think it has reached the point of saturation, but I can't help but feel that it is approaching there. In other words, each year I am very happy to see the momentum kept up and greatly relieved, because at some point we have got to come to the turn.

Q. But that is the cloud on your horizon; it is not [fol. 820] obscuring the sun?

A. When it happens in our industry, it usually happens very quickly.

Q. It hasn't happened yet?

A. No.

Q. Mr. Mosler, in your views, are branch sales offices an important factor in covering the market in the line of products of Mosler Bank Division?

Mr. Kramer: Objection. I would have no objection of asking for Mosler's experience in this field, but I do object to asking his opinion.

Mr. Nolte: I will be glad to rephrase the question.

By Mr. Nolte:

Q. In the light of your experience, are branch offices an important factor covering the market for Mosler's Bank Division products?

A. Well, the branch office itself in the Bank Division has little or no significance. The direct sales effort does have. In other words, in certain locations our bank salesman's office is in his home and there is very little display of products and, therefore, the branch office as a physical thing is not important.

Q. Let me put it another way. Why, in terms of your [fol. 821] experience, does Mosler have branch offices throughout the country for the sale of its Bank Division products?

A. We have these men located in various parts of the country. We don't want them to have to travel to any central point, and where we do have a branch office is where we have, let's say, two or three salesmen and then we have a secretary who answers telephone calls and takes dictation, but the branch office is physically a small thing.

Q. Do any of the branch bank offices stock and display Bank Division products?

A. The only branches that carry the display products are some of the branches which display commercial products and since we have a showroom for commercial products, we would also show a drive-in window.

Q. What standards do you follow in determining where you would locate a Bank Division branch office?

A. Well, actually this is strictly the economics of selling. In other words, we used to have—two branch offices in Texas, one in Houston and one in Dallas. We now have three. The reason we have three—instead of traveling two men out of one office, we just travel one out of each office and establish another so-called branch office. This [fol. 822] other branch office merely means that this is where this man has his headquarters, it is the center of his territory and this is where mail is directed and telephone calls. But the reason we do this is that we want our men located as much as possible in the center of the territory they cover and a branch office would give them the facilities required.

Q. Then I take it you are locating branch offices as near as may be possible in the center of an area where a bank products market lies?

A. Yes.

Q. The size of the office depends on the size of the particular market?

A. That's right.

Q. What function in all this does a branch manager perform?

A. Well, with the exception of the large branches such

as New York and Chicago, the branch manager is actually no more than a salesman.

Q. Does he have any functions or responsibilities beyond other salesmen?

A. He would have some minor functions, but basically he is a salesman and his only other function would be to—if the other man in the office is a new salesman, he would help him somewhat. But actually his main responsibility [fol. 823] is selling and not administration.

Q. Let us address ourselves to the year 1958. In terms of your knowledge and experience, in that year was Herring-Hall-Marvin a stronger or weaker competitor in the line of products of your Bank Division than it had been in years prior to 1958?

Mr. Kramer: Objection. That question calls for a conclusion.

Mr. Nolte: You may answer.

Mr. Kramer: This is for direct examination.

A. Actually, I am unable to answer that question, because our reporting system in those days was frankly not terribly strong and I have no way of really comparing what Herring-Hall was doing. Today, each month we have our loss order reports. Even now it is nowhere near what it should be and it is very difficult for me to assess the strength of Herring-Hall during that particular year.

Q. Do you have any knowledge or information on this question as to the first eight months of 1959?

Mr. Kramer: Same objection.

A. The first eight months of 1959?

Q. Yes, January through August 1959.

A. I would say that our new system started actually [fol. 824] in the fall of last year, so we really gave our greatest impetus to this in the fall of last year. The reason for this is that we started for the first time a program of sales forecast of budgeting and the moment we got into sales forecasting our weakness in this line became very apparent, and we started to tighten up, and I would say this year is the first year we have been going along with sales forecasts.

Q. Mr. Mosler, there have been several references

throughout this deposition to various Mosler plants and subsidiaries. For your completion of the record, would you identify and locate the several Mosler plants and the several corporate subsidiaries?

A. The wholly-owned subsidiaries?

Q. To start out with, the main or principal manufacture of Mosler is the plant in Hamilton?

A. That's correct. Then we have Mosler Lock Company in Milford, Ohio, our Dropository Corporation in Grandview, Missouri, outside of Kansas City, and the Mosler Research Products is owned by the same stockholders as own the Mosler Safe Company. It is what you call an affiliate.

Q. Where is it located?

A. Danbury, Connecticut. That is the Alarm Company.

Q. At a time prior to September 1959 did Mosler Safe [fol. 825] Company ever negotiate with HHM for the acquisition——

Mr. Barton: I object and direct the witness not to answer as being irrelevant.

Mr. Nolte: Do you decline to answer that?

Mr. Barton: I direct the witness not to answer the question.

A. I wouldn't know how to answer it.

Q. Mr. Mosler, I would like to come back to this legend of the Mosler Safe Company, the largest manufacturers of safes, I believe, and vaults and going down through the line of products—could you tell me whether in the United States there is any other company whose sales, annual sales, take the year 1958, exceeded that of Mosler Safe Company in the line of bank vault doors?

A. I don't know.

Q. You don't have any knowledge or information on that?

A. No.

Q. Would you have any knowledge or information on that question with regard to any other product along that line?

A. The only thing—actually, I'd like to say that this legend is not something that we, let's say, have reviewed

[fol. 826] yearly. This is something that has been for many years.

Q. I understand.

A. And one of the reasons we left it without any question, it has never been challenged. There is very little basis for challenging, because I know as far as we are concerned we have access to very few figures in our industry. The only figure we have access to are the label sales of the State Manufacturers National Association which are also misleading, frankly. The reason they are misleading is, for instance, in January of this year we might buy no "A" labels, four-hour labels at all, and we might not buy any for the entire year. And in January next year we might buy three thousand.

This doesn't mean that we sold no "A" labels or that we sold thousands the next year. It merely means that our purchase of labels came in on a certain date and, therefore, to ascertain any detail figures, we haven't been able to do it. That is what we have George Cronin on right now, to get some sort of a point of reference.

Q. Let's return to bank vault doors again and address ourselves to 1958. To your knowledge, in the year 1958, did any company in the United States sell a greater dollar volume of bank vault doors than did Mosler?

A. I can't answer that. For instance, I saw the [fol. 827] figures that Diebold quoted and yet in one year you could have some varying fluctuation. In other words, for instance one year there is a very, very large order out, which unfortunately we lost—I think it was for an armory. They bought a 3.5-inch vault to protect guns.

We might, for instance, sell—it is such a hard thing to answer. Let's say we sold this order for 75 3.5-inch doors and let's say Diebold sold three federal reserves; well, you can count a federal reserve door as being one of these.

Q. My question is confined to dollar volume.

A. Well, it is hard to tell what is in that dollar volume. I personally, after seeing that figure, can't give you a direct answer whether our sales were larger or less.

Q. Would you have any knowledge or information of that character for the year 1958 relative to drive-in windows?

A. The only figure that comes to my mind was the bank

vault door figure. In drive-in windows, I really don't remember the figures.

Q. When you say the figure came to your mind in relation to bank vault doors, from what does that figure come to your mind?

[fol. 828] A. When Mr. Koontz testified, he testified that he sold $2 million-some odd in bank vault doors and that figure, I don't have exactly, but I have approximately. The other figure I really don't remember.

Q. That figure, according to Mr. Koontz and according to your recollection, was not in excess of your sales?

A. It's approximation was and so a swing, which could be easily a swing in one way or another——

Q. Would you have any knowledge or information of that character with regard to any other products in the bank division?

A. No.

Q. What about in the Commercial Division?

A. The only information I have in the Commercial Division is the label sales, which I say is not that significant.

Q. Just one more minor point to clear up. We have talked repeatedly about the Mosler Bank Division and Commercial Division.

A. Yes.

Q. I think in your testimony you made some reference to a protection division.

A. Protectall Division.

[fol. 829] Q. I remember the Protectall, but you mentioned some division that might handle some form of protection.

A. This was not my testimony. It must have been Mr. Cronin. Did he mention the Mosler Protection Bureau?

Q. Let's assume that is it.

A. Well, if he did, this is an adviser; he has no sales concern at all.

Q. Well, to construct it another way: Mosler, in its only operation is divided into two main divisions, the Bank Division and the Commercial Division?

A. That's right, not flexible. There are certain products overlapping both ways.

Q. You don't have any other division of a broad and general character? In other words, you don't have a divi-

sion for protective products such as money safes as distinguished from insulated safes?

A. No. In other words, our two broad divisions are our Commercial Division and our Bank Division and then we have other divisions underneath that. For instance, we have our National Counter Division, which handles chain stores as a specialized field of division, and we also have our Systems Division and our Photoguard Division. But these are subsidiaries of the Commercial Division.

Q. Would you give us an explanation of the Systems [fol. 830] Division?

A. The Systems Division is actually a staff function.

Q. Is it within the Commercial Division?

A. Yes.

Q. For what purpose is it?

A. For the promotion of the rotary card files.

Mr. Nolte: I have nothing further.

Cross-examination.

By Mr. Kramer:

Q. In this antitrust law words are terribly important. Please forgive me, because I am going to ask you some rather detailed questions.

You spoke several times of "our industry." Those were your words. Isn't Mosler more than one industry?

A. Yes.

Q. When you think about it, what are the industries that Mosler is in; how would you characterize it?

A. We are in the protection industry. Actually, to give you a finer answer, we are in the safe and bank vault industry, we are in the alarm industry, we are in the business system industry, which includes the efficient handling of records, we are in the business of building atomic doors for atomic reactors, we are in the lock industry, we are in the [fol. 831] service industry of servicing our products, we are in the photographic industry, as far as our Photoguard situation is concerned.

Q. You said, I think it was yesterday, that your net assets were greater than Diebold. Did I understand you correctly?

A. Yes. In other words, I recall the figure that was placed in the record by Diebold was less than ours; is that right?

Mr. Barton: I think that was right.

A. That is the figure we have no reluctance in issuing, since it is in Dun & Bradstreet and it is available.

Q. That is just what?

A. It has no competitive significance.

Q. Your companies are very closely owned, aren't they?

A. That's right.

Q. You don't publish financial statements like a listed company?

A. We publish the minimum required. In fact, we have just decided to no longer furnish Dun & Bradstreet with any figures, because there is no need for that.

Q. As a member of the public, if I were to come in to your office, having been properly introduced to you, and ask for the annual reports of Mosler, you would polite-
[fol. 832] ly decline, wouldn't you?

A. The annual report of the Mosler Company is merely in the minutes of the board of directors.

Q. It is not a printed document?

A. No.

Q. Calling your attention to other concerns besides Diebold, including its Herring-Hall-Marvin Division, that are in the bank equipment end of the business or industry, or whatever we should call it, you yesterday mentioned several companies and this testimony is of great importance to Diebold and I am going to go over it. If you can, tell us where these companies are located, the cities, and the product or products that each of them makes. I do this because you weren't asked. The first one I asked is Protection Equipment Company. Do you know where they are?

A. I believe in Minneapolis.

Q. Do you know what they make?

A. I believe they make drive-in windows, night depositories and alarms.

Q. The next I have a note of is Hegeo. Where are they located, if you know?

A. I don't know.

Q If I suggest to you they are in Indianapolis, would [fol. 833] that refresh your recollection?

A. Yes.

Q. What do they manufacture in the bank equipment field?

A. I believe they manufacture drive-in windows and night depositories and I believe they sell Gross-Feible.

Q. What kind of boxes are those?

A. Safe deposit boxes.

Mr. Kramer: Would you please mark this as Defendant-Diebold Exhibit 1 for identification, please?

We will not mark it.

By Mr. Kramer:

Q. I hand you a piece of Thermo-Fax and ask you what it appears to be?

A. This is an advertisement of the Protection Equipment Company of Minneapolis.

Q. Do you know that they advertise there as Protection Equipment Company products a few more than you listed?

A. Yes, they advertise—I mentioned alarm—they advertise vault ventilators, I mentioned night depository, I mentioned pneumatic windows, they state vault doors, safe deposit boxes and automatic hydraulic sewer valves.

Q. Do you have any knowledge to know or believe that [fol. 834] ad is incorrect in that the company is not authorized to advertise things they don't sell?

Mr. Nolte: I object.

A. No.

Q. Do you know a company called Bank Steel something or other?

A. Bank Steel Corporation in Texas.

Q. What do they make?

A. They import a German door and they sell an entire line of bank equipment. I don't believe they do any manufacturing, but I am not that familiar with that. They sold this bank vault door to a bank in Tyler, Texas.

Q. You don't happen to know where in Texas they are located, do you?

A. I don't. I know that in the last issue of the Texas Bank Record there is an advertisement of Bank Steel Corporation, as well as a rider for installation.

Q. You mentioned a company named Vitsur.

A. Yes.

Q. Would you spell that?

A. V-i-t-s-u-r.

Q. Where are they located?

A. They are located in Florida and they manufacture drive-in windows.

[fol. 835] Q. Do you know where in Florida?

A. Sarasota comes to my mind.

Q. Thank you. You mentioned a safe deposit box manufacturer in California and I didn't catch the name.

A. I didn't have the name. There is one in California.

Q. You mentioned the American Bank Equipment Division of Smith-Wheelock, I believe in Toledo, Ohio. Do you know what they make?

A. I believe they are distributors of Chubb of England's equipment. They manufacture safe deposit boxes. I believe they have done some manufacturing of their own of doors where they have bought used doors of a plate construction and then built the doors from there, which is actually manufacturing the door, which they just utilize the hinge of the door. They also, I believe, manufacture night depositories.

Q. How about tellers' lockers?

A. Yes.

Q. Did you mention drive-in windows?

A. Yes. I am not sure they manufacture the window or they buy the Peco window.

Q. You mentioned foreign manufactures of bank vault doors whose products are either offered for sale or [fol. 836] from time to time have been sold within the United States and, to save time, strike that.

You mentioned the German door. What other foreign doors can you remember?

A. Marty Morris is the used dealer in New York City. I believe he sold a few Parma doors from Italy. I remember of a couple of installations on Long Island of these doors. Chubb of England has several installations in the United States. The door I already mentioned. Other than

that, I know of a Swedish manufacturer who has been looking around in this country and who probably will be coming over.

Q. Do you know whether or not there is a tariff on bank vault doors?

A. Yes, there is.

Q. Do you know what the rate is?

A. I believe it is approximately 20 percent.

Q. Now, you also mentioned both yesterday and today, Gross-Feible. Are they located in Hillsboro, Ohio?

A. Yes.

Q. What do they manufacture in the bank equipment line?

A. They manufacture principally safe deposit boxes, drive-in windows, tellers' lockers and I believe money [fol. 837] safes.

Q. How about night depositories?

A. Yes, also.

Q. You also mentioned the company of which the spelling I didn't get—LeFebure.

A. L-e-F-e-b-u-r-e. They manufacture bank equipment and then they sell equipment manufactured by Peco, Gross-Feible and so forth. That is in the record.

Q. Have you ever heard of the Florida Safe Company?

A. I believe that's Vitzer.

Q. You mentioned the Herman Safe Company of California as a concern that makes bank vault doors; am I correct?

A. That's right.

Q. Do you know if they are presently equipped to manufacture bank vault doors?

A. Yes, they are.

Q. You stated that you, meaning by "you" Mosler Safe Company, had a relationship with Herman that started, as I understood you, in October of 1959 or thereabouts; is that correct?

A. Yes.

Q. What is the relationship?

A. They distribute most of the products in the area they sell on the West Coast and service them.

[fol. 838] Q. Prior to October 1959, did they have a similar relationship with any competitor?

A. Yes, sir, they represented Herring-Hall-Marvin.

Q. In more or less the same capacity?

A. Yes.

Q. Do you know for how long a period of time Herman Safe Company has been engaged in the manufacture of bank vault doors?

A. I don't know. I believe for a considerable length of time. I believe they have done it in the last ten or fifteen years. I don't have direct knowledge.

Q. Can you tell us exactly in what territory Herman Safe Company represents you—you mentioned Oregon and Washington.

A I said not Oregon and Washington.

Q. Parts of California.

A. California and Nevada.

Q. Do you know whether it is all of California?

A. No, I am not sure—I believe it is all of California.

Q. Do you recall your testimony concerning the fact that when Herring-Hall-Marvin was independent, that is to say, before Diebold acquired it, it did, I think you said, all the business in part of California?

[fol. 839] A. That's right, Herring-Hall-Marvin I would say did practically all of the business in the area serviced by Herman. They did practically all the business in Nevada and they did practically all the business in Northern California, I mean the great proportion of the business.

Q. Since October 1959 and your relationship with Herman, has Herman, on behalf of Mosler, done all the business in that territory?

Mr. Toohey: I object.

Mr. Kramer: You may answer, if you wish.

Mr. Barton: You may answer.

A. Herman since that time has been doing the same proportionate share of the business as they did before.

Q. During your testimony yesterday afternoon you referred to, according to my notes, four local experts in selling and installing used bank vault doors. Is my recollection correct?

A. Yes, there are many throughout the United States who sell and install used doors and offer service.

Q. In your experience in the bank vault door business,

have you ever had a customer who was considering the purchase of a Mosler bank vault door new and who ultimately decided to purchased a used bank vault door?

A. Yes.

[fol. 840] Q. Are there used bank vault doors more or less continuously on the market in various sizes and fitnesses?

A. Yes.

Q. Will you briefly describe the extent to which your company is in the used bank vault door business?

A. We are primarily in it from selling a job and then having to take out used work. In other words, at the request of the banker in the used equipment business. We don't make a point of going out to try to buy up used equipment.

Q. Do I understand, then, that we could say correctly that Mosler from time to time acquires used bank equipment in trade for new?

A. Exactly.

Q. When you acquire that equipment, do you then make every effort to resell it?

A. Yes.

Mr. Toohey: I have an objection. I am not sure of what products you are talking about.

Mr. Kramer: The last question was related solely to bank vault door, but I didn't so state.

The Witness: I understand that.

Q. Have you ever heard of B.B.&C. Manufacturing Company?

[fol. 841] A. B.B.&E. or B.B.&C.

Q. Either one.

A. Bank Building & Equipment Corporation of St. Louis.

Q. What do they make?

A. They are primarily an architectural concern who go in and take what is known as a turnkey job from the bank and they will design and build it. I believe they own a marble company and other companies which feed into their construction.

Q. Incidentally, calling your attention to the Johnson Safety Vault Company of Richmond, California, I ask you have you ever heard of him?

A. Yes.

Q. What do they manufacture?

A. They primarily manufacture money safes.

Q. Is that company one of the companies to which you referred that there were many manufacturers of small safes in this country?

A. Yes—no, no, at that point I was mentioning there were many manufacturers of small safes for the home.

Q. I see.

A. There are several manufacturers in California of money safes and Johnson is a definite factor in the market on the West Coast.

[fol. 842] Q. When you speak of money safes, you are not talking about safes for the home?

A. No, I am talking about supermarket money safes.

Q. Have you ever heard of the Baldwin Company of Arlington and Dallas, Texas?

A. No.

Q. Have you ever heard of the Star Manufacturing Company in California?

A. Yes.

Q. What do they manufacture?

A. They manufacture money safes.

Q. Have you ever heard of them making a bank vault door?

A. No, I have not.

Q. Have you ever heard of them making any kind of a door for a savings and loan association in California?

A. I would like to say that that would be entirely possible, because I am not as close to West Coast picture as I should be, now it is operating through Herman. I recall something of this nature. I mentioned in the early part of my testimony that every once in a while a door appears on the market and, therefore, this would be a definite possibility on the capacity of manufacture.

[fol. 843] Mr. Nolte: Mr. Kramer, would you make your question a little clearer? You said any kind of door.

Mr. Kramer: Yes, I will make a statement for the record, but I can't testify.

This company manufactured for a client with which I am connected.

(The record was read.)

Mr. Toohey: I object to your testimony.
Mr. Kramer: I am sorry, Mr. Toohey. I will let it stand.

By Mr. Kramer:

Q. Have you ever heard of the W. J. Hines Company of Raleigh, North Carolina?
A. Yes, I have.
Q. What do they make?
A. I believe they have gone into drive-in windows and I believe they also manufacture under-counter equipment.
Q. Have you ever heard of Mid-Western Manufacturing Company in Indianapolis, Indiana?
A. Yes, I have.
Q. What do they make?
A. I don't know. I have heard of him—I don't know what they make.
[fol. 844] Q. Have you ever heard of John D. Brush & Company of Rochester, New York?
A. Yes.
Q. What do they make?
A. They make the Century Safe. I mentioned them as the Brush-Pennett Company.
Q. Have you ever heard of Quality Products Company, Inc., of Charlotte, North Carolina?
A. Yes.
Q. What do they manufacture?
A. They manufacture teller buses, security lockers, lockers and I believe mostly under-counter equipment.
Q. You mentioned lockers and then you said security lockers. Is that the same product as a vault storage locker?
A. Yes, exactly.

Mr. Kramer: May I see Exhibit 4 for identification, please?

(Document handed to counsel.)

Mr. Kramer: I hand you, Mr. Mosler, Exhibit 4 for identification. On page 1 there it says:

"The Mosler Dropository Corporation, formerly a division of Kramer Safe Company . . ."

Q. Was the Kramer Safe Company independent of [fol. 845] Mosler and its affiliates?

A. It was, it was purchased at the same time as Dropository.

Q. It is no longer in business?

A. No.

Q. It is not one or those many safe companies?

A. No. Kramer Safe Company was a dealer of Mosler Safe Company.

Q. They didn't manufacture?

A. They manufactured only a little hopper.

Q. You have referred to a group of manufacturers of safes on the West Coast, am I right?

A. Yes.

Q. You did not, of course, mean that they are related to each other?

A. No. All separate.

Q. Does that indicate that the market for safes is or is not nationwide?

A. It is nationwide.

Q. So that the factor of freight in shipping a safe from California to New York is not a major factor in the market?

A. Absolutely, yes, one of the reasons for the growth of these firms on the West Coast is that the selling price [fol. 846] on the West Coast is very much higher because of the freight of these units that have a concentrated weight.

Q. Would the same thing be true of bank vault doors?

A. Yes, that's why the Herman Safe Company manufactured bank vault doors on the West Coast.

Q. Would the same thing be true of vault doors, fire-resistive vault doors?

A. Yes, it would be true. There would be savings in fireproof vault doors, but not as much, because there you don't have the same concentration of weight.

Q. Have you ever heard of Wilkinson Associates, Inc. in Philadelphia?

A. Yes, I have.

Q. Do they manufacture bank equipment?

A. They are primarily used dealers, but I believe they do some manufacturing.

Q. What type of equipment do they manufacture, if you know?

A. I would say a filler. If they, for instance, needed a security locker in a vault in certain dimensions and they don't have it, they will manufacture it. There is also a Burros Company that manufactures drive-in windows, in Phoenix, Arizona.

Mr. Kramer: Off the record.

[fol. 847] (Discussion off the record.)

By Mr. Kramer:

Q. Have you ever heard of Mid-Western Manufacturing Corporation of Indianapolis?

Mr. Barton: We have gone over that already.

Mr. Kramer: We have.

A. Yes.

Q. Have you ever heard of the Acorn Company in Chicago, Illinois?

A. Yes, I have, but just vaguely.

Q. Do you know whether or not they manufacture fire-resistive security vaults?

A. I don't.

Mr. Kramer: No further questions.

Mr. Nolte: Just so the record may be clear, you testified here in response to a subpoena; is that correct?

The Witness: That's correct.

Mr. Nolte: Mr. Kramer, so the record may also show, the other two gentlemen, Mr. Belasco and Mr. Koontz, also testified in response to subpoenas.

The Witness: That is correct.

(Witness excused.)

(Whereupon, at 3:45 p.m. an adjournment was [fol. 848] taken.)

[fol. 849] LYBRAND, ROSS BROS. & MONTGOMERY

Certified Public Accountants

March 1, 1961

Mr. F. D. Robinson, Vice President
and Treasurer,
Diebold, Incorporated,
Canton 2, Ohio.

DEAR MR. ROBINSON:

We submitted under date of August 14, 1959 for inclusion in the annual report of the Board of Directors, the following certificate with respect to the financial statements for the year ended June 30, 1959 of Herring-Hall-Marvin Safe Company:

> We have examined the balance sheet of Herring-Hall-Marvin Safe Company as of June 30, 1959, and the related statements of income and earnings retained in the business, and capital contributed for shares in excess of par value for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> In our opinion, the accompanying balance sheet and statements of income and earnings retained in the business, and capital contributed for shares in excess of par value present fairly the financial position of Herring-Hall-Marvin Safe Company at June 30, 1959, and the results of its operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

The above referred to balance sheet included the item of cash in the amount of $142,521.63 which was comprised of the following amounts:

[fol. 850] Petty cash	$ 2,400 00
First National Bank and Trust Company of Hamilton:	
Regular	(a) *10,916 41*
Payroll	800 00
Special	500 00
Irving Trust Company	78,630 14
Continental Illinois National Bank	26,909 72
First National Bank of Boston	1,000 00
Peoples First National Bank of Pittsburgh	6,477 90
The Wells Fargo Bank	36,412 01
Toledo Trust Company	555 75
Chase Manhattan Bank	52 52
	$142,521 63

(a) Supported by the following reconciliation, as it appears on page 2 of special report, dated December 8, 1960:

Balance per bank	$191,593 92
Deposits in transit	24,319 03
	215,912 95
Less:	
Outstanding checks	174,800 75
Miscellaneous reconciling items, net	5,169 99
Balance per books, before audit adjustment	35,942 21
Checks released prior to July 1, 1959, but not recorded in the general ledger prior to that date	46,858 62
Corrected book balance	*$ 10,916 41**

Clerks Note—Red figures are printed in italics.

[fol. 851] As disclosed by the above, the outstanding checks on June 30, 1959 should have been $221,659.37 ($174,800.75 + $46,858.62) instead of $174,800.75 as shown by the company's records before audit adjustment.

We stated the following in our December 8, 1960 "Report upon Review of Certain Accounts and Records as of various dates during 1959" the following:

> "The exception with respect to outstanding checks is due to the fact that the Company followed the procedure of preparing checks in payment of invoices at the time invoices were approved, but of not releasing them until later. No detail is available of the checks not yet released, or of those released and still outstanding, as of the respective dates".

In supplement to the above, we add that, in connection with our review of the Company's bank reconciliations, or the preparation of our own reconciliations as of April

30, May 1, May 8, May 15, May 22, May 29 and September 10, 1959 (dates commented upon in report of December 8, 1960) nothing came to our attention which would lead us to believe that the outstanding checks on the respective dates did not total at least the amounts reflected in the reconciliations and produce overdrafts at least in the amounts shown on the Report of December 8, 1960.

Very truly yours, Lybrand, Ross Bros. & Montgomery.

[fol. 852] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRANK D. ROBINSON—Filed March 8, 1961

COUNTY OF STARK,
State of Ohio, ss:

FRANK D. ROBINSON, being duly sworn, deposes and says:

1. I am the Vice President and Treasurer of Diebold, Incorporated. As the chief financial officer of Diebold, I was directly responsible for all books and records of account acquired from the former Herring-Hall-Marvin Safe Company. The subsequent accounting required to integrate these HHM records with those of Diebold have made me familiar with these records and with the accounting processes used.

2. Included among the accounting records acquired from the former Herring-Hall-Marvin Safe Company was a book containing the monthly cash control sheets. The cash control sheets shows the following condition with respect to the Company's overall commercial account bank balances, beginning with the start of the Herring-Hall-Marvin's fiscal year, July 1, 1957:

(Red figures indicate amount of overdraft on *all* commercial accounts)

Month	Number of Days Overdrawn (all banks)	Minimum Balance
July, 1957	0	$ 37,943 01
August	0	30,286 84
September	0	118,069 20
October	0	115,174 82
November	0	103,650 50
December	0	104,307 68
January, 1958	0	113,876 61
February	0	55,954 49
March	0	26,267 87
April	0	42,784 45
May	0	58,858 00
June	0	90,799 02
July	0	174,606 49
August	0	187,465 82
September	0	95,548 98
October	0	16,559 15
November	4	*33,317 82**
December	5	*56,090 42**
January, 1959	0	19,482 51
February	0	28,754 48
March	0	19,676 04
April	8	*37,655 76**
[fols. 853-854]		
May	10	*$66,890 68*
June	2	*28,046 25*
July	8	*65,947 98*
August	7	*54,279 14*
September (thru the 10th)	6	*47,692 66*

Clerk Note—Red figures are printed in italics

3. The highest minimum balance of $187,465.82 was reached in August, 1958, the month that the Canadian subsidiary was sold.

Frank D. Robinson.

Subscribed and sworn to before me this 27th day of February, 1961.

Elwood C. Wilson, Notary Public, State of Ohio.

My Commission Expires Oct. 13, 1962.

[fol. 855] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT—Filed March 8, 1961

AFFIDAVIT OF FRANK D. ROBINSON

COUNTY OF STARK,
State of Ohio, ss:

FRANK D. ROBINSON, being duly sworn, deposes and says:

1. I am the Vice President and Treasurer of Diebold, Incorporated. As the chief financial officer of Diebold, I was directly responsible for all the books and records of account acquired from the former Herring-Hall-Marvin Safe Company. The subsequent accounting required to integrate these HHM records with those of Diebold have made me familiar with these records and with the accounting processes used.

2. The precarious financial plight of the Herring-Hall-Marvin Safe Company cannot properly be judged from the balances shown on the statements of account issued by its banks. In addition to the fact that these bank statements do not reflect the outstanding checks sent to its creditors which were in "float" an any date, and which caused very substantial overdrafts on the bank accounts on many days in the first nine months of 1959, the balances shown on these bank statements were inflated from time to time by a float created by the company itself due to the transfer of funds by check within its own bank accounts. Transfers of funds during the first nine months of 1959 that involved four of the Company's banks with three checks of identical amount being issued payable to the Company itself and on the same day were as follows:

Check Date	Bank Drawn On	Bank Deposited In	Amount of Check
1/2/59	Wells Fargo*	Peoples	$22,500.00
1/2/59	Peoples*	Irving Trust	22,500.00
1/2/59	Irving Trust*	First Nat'l.*	22,500.00
1/26/59	Wells Fargo	Irving Trust	40,000.00
1/26/59	Irving Trust	Peoples	40,000.00
1/26/59	Peoples	First Nat'l.	40,000.00

* Wells Fargo Bank—San Francisco; Irving Trust Company—New York; Peoples First National Bank & Trust Company—Pittsburgh; First Nat'l. Bank & Trust Company—Hamilton.

[fol. 856]

Check Date	Bank Drawn On	Bank Deposited In	Amount of Check
1/30/59	Wells Fargo	Irving Trust	$34,000 00
1/30/59	Irving Trust	Peoples	34,000 00
1/30/59	Peoples	First Nat'l.	34,000 00
2/17/59	Wells Fargo	Irving Trust	31,000 00
2/17/59	Irving Trust	Peoples	31,000 00
2/17/59	Peoples	First Nat'l.	31,000 00
3/5/59	Wells Fargo	Irving Trust	16,000 00
3/5/59	Irving Trust	Peoples	16,000 00
3/5/59	Peoples	First Nat'l.	16,000 00
3/24/59	Wells Fargo	Irving Trust	19,000 00
3/24/59	Irving Trust	Peoples	19,000 00
3/24/59	Peoples	First Nat'l.	19,000 00
4/6/59	Wells Fargo	Irving Trust	30,000 00
4/6/59	Irving Trust	Peoples	30,000 00
4/6/59	Peoples	First Nat'l.	30,000 00

3. As an example of the degree of inflation in balances per bank statement resulting from the transfers set forth above, I examined the bank statements involved in the three $34,000.00 transfers of January 30th. These three transfers checks of $34,000.00 were credited as deposits to the account of the Herring-Hall-Marvin Safe Company on February 2, 1959 by:

The Irving Trust Company

Peoples First National Bank & Trust Company

The First National Bank & Trust Company of Hamilton

The $34,000.00 checks were debited to Herring-Hall-Marvin's account by Wells Fargo and Peoples on February 4th, and by Irving on February 3rd. Therefore, as at February 2, 1959, all four bank balances per the respective bank statements contained this same $34,000.00. The Company actually had only one $34,000.00 to transfer, but the total aggregate balances per all four bank statements credited $136,000.00, and contained an inflation due to float, of $102,000.00. The transactions listed above involved four banks, but in all months of 1959, transfers were in "float" between at least two banks. Such transfers also involved "float". However, I have listed above only transfers of identical amounts involving four banks.

4. The Herring-Hall-Marvin Safe Company followed the procedure of preparing commercial accounts' checks at the time the invoices were approved, and of not releasing them until later. These checks were not released on the due date because of lack of funds. The number of checks, [fol. 857] drawn on the First National Bank and Trust Company of Hamilton, that cleared that Bank more than 30 days after the date of the check are as follows:

Month	Number of Checks
January, 1959	208
February	142
March	134
April	134
May	146
June	107
July	136
August	175
September	29

Examples of the time required to pay some accounts are as follows:

Check #	Payee	Amount of Check	Date of Check	Date Cleared The Bank
12151	Rockford Machine Tool Co.	$ 1,111.00	9/15/58	1/ 2/59
12746	A.D.T. Company	1,073.52	10/ 6/58	1/12/59
12993	Crucible Steel Company	11,256.65	10/10/58	1/ 5/59
13165	Crucible Steel Company	12,094.50	10/13/58	1/ 7/59
15036	Aluminum Co. of America	17,047.28	11/19/58	1/ 7/59
12992	Buckeye Mfg. & Foundry	1,047.58	10/ 9/58	1/15/59
13824	Chadwick Mfg. Co.	7,592.57	10/24/58	1/19/59
14310	Ahaus Tool Co.	2,663.75	11/ 6/58	1/26/59
13451	Lincoln Electric Co.	680.00	10/16/58	2/ 5/59
14607	Crucible Steel Co.	10,970.53	11/11/58	2/ 6/59
15709	Crucible Steel Co.	14,450.62	12/ 5/58	3/ 2/59
13813	Crucible Steel Co.	12,357.40	12/ 9/58	3/ 6/59
16003	Crucible Steel Co.	14,772.83	12/12/58	3/20/59
17372	Crucible Steel Co.	12,224.30	1/13/59	4/ 9/59
17470	Aluminum Co. of America	3,349.61	1/15/59	4/10/59
17471	Aluminum Co. of America	16,494.41	1/15/59	4/10/59
18798	Aluminum Co. of America	5,519.70	2/17/59	5/13/59
17318	F. W. Madden	1,032.08	1/12/59	5/26/59
18799	Aluminum Co. of America	1,848.31	2/17/59	5/13/59
18913	Aluminum Co. of America	4,376.92	2/18/59	5/13/59
18800	Aluminum Co. of America	10,892.25	2/17/59	5/13/59
19894	Aluminum Co. of America	8,969.03	3/16/59	6/ 3/59
19895	Aluminum Co. of America	5,518.27	3/16/59	6/ 3/59
20076	Aluminum Co. of America	10,054.04	3/16/59	6/ 5/59
22672	Sargent & Greenleaf	2,409.25	5/14/59	6/18/59
20487	Chadwick Mfg. Co.	4,261.00	3/26/59	7/20/59
21584	Aluminum Co. of America	13,290.79	4/22/59	7/ 8/59
21585	Aluminum Co. of America	14,711.58	4/22/59	7/ 8/59
24148	Sargent & Greenleaf	9,159.96	6/18/59	7/20/59
24246	Crucible Steel Co.	4,241.51	6/22/59	8/17/59
25508	H.H.M. Employees Credit Union	1,083.00	7/16/59	8/18/59
22964	Egyptian Lacquer Mfg. Co.	2,195.65	5/21/59	8/13/59
23969	Aluminum Co. of America	5,852.82	6/16/59	9/ 8/59
23970	Aluminum Co. of America	15,186.28	6/16/59	9/ 8/59

[fol. 858] 5. The closing balance sheet of HHM as of September 11, 1959, reflects the following assets and liabilities:

Assets		Liabilities	
Cash	$ 61,867.82	Notes Payable	$ 337,323.29
Notes—Accounts Receivable	1,377,523.96	Accounts Payable	751,957.34
Inventories	2,013,243.15	Accrued Expenses	613,641.69
Less: Advances	393,904.67Cr.	Provision Fed. Income Tax	115,885.92
Prepaid Expenses	226,092.04		
Total Current Assets.	3,284,822.30	Total Current Liabilities	1,818,808.24
Investments	6,081.00	Capital Stock	5,890.00
Net Fixed Assets	742,007.55	Capital Surplus	59,564.32
Patents	1.00	Earnings Retained	2,148,649.29
	$4,032,911.85		$4,032,911.85

6. Attached hereto as Exhibit 1 is a Force Report of Employees located at Hamilton, Ohio, prepared at my direction and under my supervision.

7. I attach hereto as Exhibits 2, 3, and 4, three documents recently found in the files of HHM in connection with the audit of the Company's records by Lybrand, Ross Brothers and Montgomery.

8. During the month of January 1, 1961 to January 31, 1961, the net sales billed from the HHM Hamilton plant were $409,415, or $4,912,980 at an annual rate.

Frank D. Robinson.

Subscribed and sworn to before me this 27th day of February, 1961.

Elwood C. Wilson, Notary Public.

My Commission Expires Oct. 13, 1962.

[fol. 859] EXHIBIT "1" TO AFFIDAVIT

Herring-Hall-Marvin Safe Company
Division of Diebold, Incorporated
Hamilton, Ohio

February 10, 1961

Force Report of Employees Located at Hamilton, Ohio

	Employees on payroll at September 11, 1959	Employees on payroll at January 31, 1961	Employees payroll at February 10, 1961	Total Reduction
Hourly Paid....	493	326	241	252
Salaried.....	171	139	129	42
Total.....	664	465	370	294

[fol. 860] EXHIBIT "2" TO AFFIDAVIT

Aluminum Company of America
2331 Victory Parkway
Cincinnati 6, Ohio
December 10, 1958

Herring-Hall-Marvin Safe Company,
1550 Grand Boulevard,
Hamilton, Ohio.

Attention: Mr. G. L. Schlegel, Treasurer

DEAR MR. SCHLEGEL:

It was a pleasure to see you once again and discuss the operations of your company during my visit to your office last week.

During our conversation, you mentioned that you continue to have difficulty in getting your receivables paid on the security files in which our aluminum is used. You suggested that perhaps we could permit our invoices to be paid in 90 days, rather than in accordance with the regular terms of net 30 days. This matter was brought to the attention of our Credit Manager, and it boiled down to a matter of company policy. While we certainly are sympathetic with your collection problems, we have a great number of customers selling a variety of products who are

confronted with this same problem. From the standpoint of being fair to all of our customers, we cannot agree to your proposition. If we did agree, it would be a question of discriminating in your favor, which not only would be unfair to other customers in the same circumstances, but it would also present a serious collection problem for our company if we permitted our other customers to also take an additional 60 days in payment of our invoices.

[fol. 861] You may be assured that this matter was given serious consideration by a number of people in our company. While we have not been able to agree to this particular request, we hope that you will feel free to call on us again if other problems develop where we possibly can be of some asistance to you.

Very truly yours, Aluminum Company of America.
Douglas R. Hallett, District Credit Manager.

DRH/bs

[fol. 862] EXHIBIT "3" TO AFFIDAVIT

Aluminum Company of America
Pittsburgh 19, Pa.
September 21, 1956

Herring-Hall-Marvin Safe Company, Inc., 1550 Grand Boulevard, Hamilton, Ohio.

Attention: Mr. G. L. Schlegel, Treasurer

GENTLEMEN:

We again wish to take the opportunity to thank you for taking the time to visit personally with Mr. Hubbell and the writer this morning, and bringing us up to date as to developments at your good company. It was gratifying to learn, from our discussion, and the June 30 fiscal year end figures presented by you, that considerable progress has been made over the past year, particularly with regard to increased sales and profits derived therefrom.

In line with our discussion, with respect to settlement of your balance, we have noted our records that payment of the July 19 invoice $9,376.56 will be made on or before September 30, and that payment of the July 19 invoice

$25,061.51 will be forthcoming on or about October 15. It was our further understanding that with increased heavy September shipments, you will be in a position to forward payment of the August 31 invoices approximating $17,000.00 sometime during the latter part of October.

Thanking you again for your cooperation, we are

Yours very truly, Aluminum Company of America
H. F. Hunter, Credits and Collection.

HFH/rag

[fol. 863] EXHIBIT "4" TO AFFIDAVIT

Mr. G. L. Schlegel
June 16, 1958 (dict. 6-13-58)
Goals for June 30, 1958
Warren Mosman Personal & Confidential

As I told you, I would like the following things done before the end of June:

1. I would like to pay the Peoples' First National Bank & Trust Co. of Pittsburgh, Pennsylvania $25,000.00. OK

2. I would like to pay The Canadian Bank of Commerce at least $5,000.00 and more if possible. OK

3. You, of course, are prepared to handle the insurance matter. OK

4. I would like to show a net profit, after taxes, of at least $150,000.00. OK

5. I would like to show a net worth of approximately $2,100,000.00. OK

I know you have these things in mind but in order to point them out so that you, Mr. Henkel and I know exactly what we have in mind, I am writing this "confidential" letter to you which Georgia will hand to you and Mr. Henkel in person and see if we can work toward these goals.

Warren Mosman

WM:gll

cc: Mr. H. L. Henkel

[fol. 864] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil Action No. 4485

UNITED STATES OF AMERICA, Plaintiff,

v.

DIEBOLD, INCORPORATED and HERRING-HALL-MARVIN SAFE COMPANY, Defendants

JUDGMENT—Filed March 8, 1961

This cause was heard on Defendant Diebold's Motion for Summary Judgment, and the Court having considered the motion, the pleadings, the affidavits and depositions on file, and being fully advised in the premises, it is

Ordered and Adjudged, that Defendant Diebold's Motion for Summary Judgment be and the same is hereby granted.

John H. Druffel, U. S. D. J.

Dated: ——.

[fol. 865] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil Action No. 4485

UNITED STATES OF AMERICA, Plaintiff,

v.

DIEBOLD, INCORPORATED, and HERRING-HALL-MARVIN SAFE COMPANY, Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW, MARCH 1, 1961

DESCRIPTION OF ACQUISITION

1. On September 11, 1959, Diebold, Incorporated (Diebold) acquired the assets of Herring-Hall-Marvin Safe Company (HHM) for $3,000,000 cash and the assumption of all liabilities.

2. The acquisition resulted from an offer, in May 1959,

by Mr. Mosman, president of HHM, of a quick cash sale of the assets of HHM to Diebold. As a basis for negotiating the sale, Mr. Mosman tendered Diebold a balance sheet as of April 30, 1959, which reflected that HHM had a cash balance on that date of $115,507.32. Both the option agreement between Diebold and HHM of June 16, 1959, and the purchase agreement of July 17, 1959, referred to and were based on the balance sheet of April 30. Subsequently, and prior to the execution of the option agreement, Mr. Mosman informed Diebold he could not warrant the balance [fol. 866] sheet of April 30, 1959, because, for the purpose of that sheet, he had reclassified $100,000 of "receivables" as "cash". A recent audit of the books of HHM discloses that the balance sheet of April 30, 1959, also failed to reflect $28,165.36 of outstanding April payroll checks. Instead of the purported cash balance of $115,507.32 on April 30, 1959, HHM actually had a net overall deficit cash balance (overdrafts outstanding) of $12,658.04.

3. At the closing of the purchase on September 11, 1959, Diebold representatives were informed that HHM could not present a check for the balance in its principal depository, the First National Bank and Trust Company of Hamilton, because that account was overdrawn by approximately $50,000. Checks were tendered for small amounts in other banks ranging from $800 to $9,477.90. Actually, the HHM account at the First National Bank and Trust Company of Hamilton had overdrafts outstanding on September 10, 1959, of $53,978.59. Crediting against this deficit the smaller amounts in other banks, HHM, on September 10, 1959, had a net overall deficit in all bank accounts in the amount of $35,596.61.

Financial Condition of HHM During 1959

4. At all times between June 1950 and September 11, 1959, when HHM was acquired by Diebold, HHM had been short of working capital and, from 1953 on, HHM had found it necessary to make frequent use of bank loans on a straight note basis to finance the company's annual sales volume.

[fol. 867] 5. In an effort to improve its net working capital position, HHM consistently retained substantially all of

its earnings after taxes and the proceeds from the periodic liquidation of its readily disposable divisions and subsidiary companies. In 1954, the company received and retained $150,000 in insurance proceeds resulting from the complete destruction by fire of the facilities of its subsidiary, Thomas Manufacturing Company. In fiscal 1955, it sold its Quickdraft division for $100,000 on time payments. In fiscal 1959, it sold its Remington division for $98,000 and its Canadian subsidiary for $130,000.

6. HHM's balance sheets from June 1950 down through 1958 continuously reflected liabilities well in excess of tangible net worth, and its current ratio (the relationship of its current assets to its current liabilities) averaged only approximately 1.5 for the years 1951 through 1959 in contrast with an average of 2.7 during the same years for all manufacturers of fabricated metal products. By June of 1959, HHM's cash position was such that its net quick asset ratio (the relationship between cash and government securities on the one hand and current liabilities on the other) dropped to .074, the lowest in HHM's experience since 1951 and less than one-fifth the average net quick ratio of all companies in the fabricated metal products industry. By September 11, 1959, when Diebold acquired HHM, HHM's net quick asset ratio had declined to .03.

[fol. 868] 7. HHM's sales reached a peak in 1956-57 when the company had net sales of $10,672,000. In each of the next two years, fiscal 1958 and fiscal 1959, HHM's sales fell approximately $300,000 each year under the preceding year, to a low for fiscal 1959 of $10,023,000.

8. As sales fell in fiscal 1959 by approximately $300,000, inventories built up in the amount of $262,000.

9. Subsequent examination of the books and records of HHM disclosed the following financial condition that faced the company as the year 1959 wore on: out of 114 working days between April 1, 1959, and the consummation of the sale on September 11, 1959, HHM had overdrafts outstanding against balances in its principal depository (First National Bank and Trust Company of Hamilton) on 69 days (60% of the working days) in amounts ranging from $104.51 to $78,394.58. Similarly, the company had total net overdrafts outstanding on all of its commercial bank

accounts on 41 days during the same period in amounts varying from $1,123.72 to $66,890.68.

10. Subsequent examination and audit of HHM accounts also disclosed that: (1) during the entire month of May 1959 the regular payroll account of HHM in the First National Bank and Trust Company of Hamilton had payroll overdrafts outstanding in amounts ranging from $24,466.29 to $54,297.52; (2) during at least half the month of May the overdrafts on the regular payroll account were subsequently reimbursed by overdrafts on HHM's general ac- [fol. 869] count in the First National Bank and Trust Company of Hamilton which account itself had overdrafts outstanding in amounts ranging from $38,551.37 to $116,809.86; and (3) on May 1, 1959, the HHM accounts in all banks had overdrafts outstanding against them in the amount of $79,037.17, and on May 8, the accounts in all banks had overdrafts outstanding in the amount of $57,325.79.

11. The annual examination by the HHM auditors of the books of account disclosed that the June 30, 1959, balance sheet of HHM which purported to reflect a net cash balance in the regular account at the First National Bank and Trust Company of Hamilton, Ohio, of $35,942.21, failed to reflect outstanding checks in the amount of $46,858.62. When adjustment was made by the auditors to account for these undisclosed and outstanding June checks, HHM was shown to have had overdrafts outstanding on the regular account of the First National Bank and Trust Company of Hamilton as of June 30, 1959, in the amount of $10,916.41.

12. Recent audit of the HHM books and records also discloses that while HHM apparently had $13.92 on deposit in the First National Bank and Trust Company on September 3, 1959, the company actually had overdrafts outstanding as of September 3 on this bank in the amount of $73,127.80.

13. HHM's bank statements showed modest minimum monthly balances in its principal depository, the First National Bank and Trust Company of Hamilton: January, $97,535; February, $142,586; March, $75,743; April, $6,[illegible]3; [fol. 870] May, $27,871; June, $44,741; July, $33,751; August, $55,308; September, $13. These bank balances do not

properly reflect the financial condition of HHM because (1) they failed to reflect the outstanding checks sent to creditors which represented overdrafts that had not yet cleared the bank on 60% of the working days between April 1 and September 11, 1959; and (2) they failed to reflect an inflation of bank balances created by the company itself through transfer, from time to time, of funds by check within its own bank accounts, e.g., on January 30, 1959, HHM drew a check for $34,000 on Wells Fargo Bank (San Francisco) for deposit in Irving Trust Company (New York); on the same day, a check for $34,000 was drawn on Irving for deposit in Peoples First National Bank and Trust Company (Pittsburgh); and on the same date, a check in the amount of $34,000 was drawn on Peoples for deposit in the First National Bank and Trust Company (Hamilton, Ohio). HHM only had one $34,000 deposit to transfer, but on February 2, 1959, the total aggregate balances reflected in all four banks credited $136,000.

14. On December 30, 1958, HHM borrowed $250,000 on demand notes from its principal depository, the First National Bank and Trust Company of Hamilton, which was limited by law to an indebtedness of $300,000 to any one customer. On May 6, 1959, HHM, again on demand notes, increased its loan to the limit of $300,000. On May 13, 1959, the loan was reduced to $250,000, but on September 11, 1959, HHM, again on demand notes, increased its loan [fol. 871] to the limit of $300,000. On deposition, the president of the bank testified that the bank did not wish to carry this loan at the legal limit permanently and that if the bank had called upon HHM to pay off the demand notes, he did not know where the company could have obtained the funds to do so. Defendant Diebold paid off the $300,000 of HHM demand notes on September 16, 1959.

15. In March 1959, at the expiration of its annual contract, the HHM Union, Safe Workers Organization, Chapter 1, presented the company with demands for wage costs which were higher than those common in the area or the industry. These demands placed the company at a competitive disadvantage by increasing wage costs and decreasing efficiency. Because of its limited working capital position and the highly competitive nature of the industry in the spring of 1959, the company could not stand a strike,

and it finally accepted the Union's terms. Before accepting these terms, however, the president of HHM, Mr. Mosman, gave serious consideration to recommending to the Board of Directors that the company be liquidated.

16. Examination and audit of the books of account of HHM immediately upon Diebold's taking possession of them reflected the fact that the company had suffered operating losses between July 1 and September 10, 1959, of $206,953.51.

17. Subsequent examination and audit of the books of account of HHM reflected that as of September 11, 1959, HHM had accumulated past due trade bills dating back to prior to January 1959 in the amount of $244,127.68. In [fol. 872] addition to this amount of past due accounts, HHM on September 11, 1959, also had currently due trade bills in the amount of $499,833.66.

18. HHM followed the procedure of preparing commercial accounts' checks at the time the invoices were approved, but of not releasing them until later because of lack of funds on the due date. As a result, a lapse of between 30 and 120 days between preparation of a check and its issuance and cancellation by the bank was not unusual. During the first 9 months of 1959, the following checks cleared the bank more than 30 days after the date of the check: January, 208; February, 142; March, 134; April, 134; May, 146; June, 107; July, 137; August, 175; September 1-11, 29. Illustrative of this practice were checks Nos. 17470 and 17471 drawn to the order of the Aluminum Company of America for $3,349.61 and $16,494.41, respectively, both dated January 15, 1959, and both canceled by the bank on April 10, 1959, although on December 30, 1958, the Aluminum Company of America specifically declined a request of HHM that its 30 days net credit terms be extended to 90 days.

19. As a result of the overdraft disclosed to Diebold at the closing on Friday, September 11, 1959, Diebold caused $200,000 in cash to be deposited in the First National Bank and Trust Company of Hamilton on the second next banking day, September 15, 1959. Shortly thereafter, on September 28, 1959, Diebold deposited an additional $300,000 in cash in the First National Bank and Trust Company of Hamilton. A subsequent deposit on October 22, 1959,

brought the aggregate cash advances by Diebold between September 15 and October 22, 1959, to a total of $503,801.90 [fol. 873] to meet current and past due obligations of HHM. By July 31, 1960, these cash advances aggregated $840,000.

20. Although the annual balance sheets and profit and loss statements purported to show a modest improvement in HHM's financial condition from year to year, these "book" figures failed completely to reflect the actually insolvent condition of the company. The books were prepared in accordance with management policy. The Treasurer of HHM was informed by the President on June 16, 1958, of the following "goals for June 30, 1958" (fiscal year-end): "I would like to show a net profit, after taxes, of at least $150,000" and "I would like to show a net worth of approximately $2,100,000." The Treasurer noted "OK" on these instructions, and the June 30, 1958, balance sheet showed net worth of $2,126,502 and the profit and loss statement showed net profit after taxes of $188,814. These figures were confirmed by HHM's auditors.

21. Upon the disclosure to Diebold at the closing on September 11, 1959, that HHM had overdrafts outstanding against its bank balances and upon the discovery that HHM had suffered an operating loss of $206,000 between July 1, 1959, and September 11, 1959, Diebold immediately called in H. B. Maynard and Company, independent management consultants, to conduct a survey of operations in the Hamilton plant of HHM. Maynard engineers spent approximately six weeks in the plant surveying manufacturing techniques, worker efficiency, and managerial and supervisory competence. As a result of this survey, [fol. 874] Maynard and Company prepared performance reports which indicated (1) manufacturing methods in the HHM plant were poorly conceived and inadequately supervised; (2) tooling and equipment lacked modern design and showed little ingenuity or imagination; and (3) labor performance achieved only a level of 70-75% of standard as compared with the 92-93% level of performance assumed to exist by the old HHM management. The Maynard report concluded that HHM was a high-cost producer which could exist only as a marginal operation and which could probably not survive in a highly competitive market.

The survey indicated that substantial cost reductions could and should be immediately initiated in the HHM plant.

22. Correction of many of the deficiencies found in the HHM plant by the Maynard engineers required revision of the uneconomic Union contract which Diebold acquired from HHM and which produced low productivity and high wage costs on the Hamilton plant. In March 1960, Diebold began bargaining with the Union, seeking to get improved productivity in this plant. The bargaining dragged on through March, April, May and June. Diebold finally notified the Union that unless it could work out a contract which would give it reasonable productivity so as to make the plant competitive, the losses it was incurring in the operation of the plant would force Diebold to close it. On July 7, 1960, the Union signed a two-year contract that (1) eliminated the arbitrary wage escalator clause that had permitted uncontrolled inflation of costs, (2) removed the prior prohibitions on wage incentive plans [fol. 875] and provided for a wage incentive plan, and (3) gave Diebold a two-year contract, thus avoiding the cost, time, and uncertainty of year to year bargaining.

23. Operations of the HHM Division of Diebold continued during the first seven months of 1960 to reflect losses, culminating in a loss of $106,000 for the month of July 1960.

24. In addition to the deficiencies in manufacturing performance at the HHM plant, there has been a sharp loss in business by HHM Division. In the eight months ended August 31, 1960, orders entered by the HHM Division declined $2,307,707, or 29.8% from the similar eight-month period of 1959. Excluding government orders, the decline in commercial business was even more severe, aggregating 40% under the first eight months of 1959. Shipments for the first eight months of 1960 exceeded new orders by $449,000, or approximately 10%, and by January 31, 1961, orders shipped had fallen to a level of approximately $409,000 per month, or $4,900,000 annually.

25. The decline in sales and shipments of the HHM Division has required the continuous lay-off of employees at the Hamilton plant, including a lay-off of 95 employees on February 1-4, 1961. Employment at the plant has declined from 664 employees on September 11, 1959, to

370 on January 31, 1961, a total decline of 294 employees, or approximately 45%.

26. When a rumor spread around during the latter part of 1958 and the first half of 1959 that the stock or assets of HHM might possibly be for sale, three different pro- [fol. 876] moters solicited the HHM ownership-management to consider tentative schemes for acquiring, merging, or exchanging the stock or assets of HHM. None of these overtures ever approached the concreteness of a firm offer or a firm price and no financial data or operating figures were supplied by HHM. Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities.

27. Diebold was in need of additional plant space to which it might remove part of its production from its overcrowded facilities in Canton, Ohio, where efficient, economical expansion was not feasible.

Conclusory Findings

28. At the time of its acquisition by Diebold on September 11, 1959, and for at least 9 months prior thereto, HHM was hopelessly insolvent and faced with imminent receivership.

29. The facts concerning HHM's true financial condition were never disclosed to Diebold or to any of the promoters mentioned above. HHM's opportunity to achieve a sale on the terms it sought, and obtained from Diebold, was contingent upon the swift conclusion of a sale without exhaustive analysis of its books and records. Diebold was in need of additional plant space to handle existing business. It purchased on HHM's terms, in reliance on HHM's representations, without full access to HHM's books and records.

[fol. 877] 30. Diebold was the only bona fide prospective purchaser for HHM's business. Aside from Diebold, no one else ever made an actual offer for HHM's business or property.

31. Diebold's acquisition of HHM did not threaten, or actually cause, a lessening of competition within the meaning of Section 7 of the Clayton Act. By reason of its precarious financial condition, HHM could not long have survived as an independent competitor in its line of busi-

ness and could not have achieved a sale to anyone else. But for the sale to Diebold, HHM would have been forced to liquidate its business in insolvency proceedings, with resultant heavy losses to employees, creditors, and stockholders.

Conclusions of Law

1. The Court has jurisdiction over the defendants and the subject matter of this suit.

2. There is no genuine issue as to any material fact.

3. HHM, at the time of its acquisition, was a failing company with resources so depleted and the prospect of rehabilitation so remote that it faced imminent receivership with resulting loss to its stockholders and injury to the community where its plant was operated.

4. Diebold was the only bona fide prospective purchaser able and willing to pay $3,000,000 and to assume the liabilities of HHM.

[fol. 878] 5. The defendant Diebold is entitled to judgment as a matter of law.

John H. Druffel, U. S. D. J.

Dated: March 8, 1961.

[fol. 879] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

Transcript of Proceedings of March 8, 1961

(Hearing on Various Motions)

Be it Remembered that on Wednesday, March 8, 1961, at 11:00 o'clock A.M., the above-styled action came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division.

[fol. 880] APPEARANCES:

For the Plaintiff: John M. Toohey, Attorney, Department of Justice and Walter T. Nolte, Attorney, Department of Justice and Richard H. Pennington, Assistant United States Attorney.

For the Defendant Diebold, Incorporated: William L. McGovern, Esq. of Arnold, Fortas & Porter.

For the Defendant Herring-Hall-Marvin Safe Company: Murray S. Monroe, Esq. of Taft, Stettinius & Hollister.

For the Mosler Safe Company: Edgar Barton, Esq. of White & Case.

[fol. 881] The Court: Good morning.

Mr. Barton: Good morning.

The Court: What do we have now?

ARGUMENT ON MOTION TO SUPPRESS NEISSER AFFIDAVIT AND ATTACHMENTS

Mr. McGovern: Your Honor, there is a motion by counsel for Mosler with respect to the disclosure of certain material and tax returns that I would suppose might be preliminary to anything else before us.

Mr. Barton: Your Honor please, you recall that about a month ago I was out here to argue a motion directed to the subpoena duces tecum——

The Court: If you will excuse me a minute Mr. Ebel, there is too much light here. It hurts your eyes.

All right; go ahead.

Mr. Barton: —and the motion at that time was directed to a subpoena duces tecum served on my client, Mosler Company, for the Government asking for some very extensive sales information.

Now, your Honor reserved decision on that motion, as you will recall, pending determination of a motion which was to be made by the defendant Diebold directed to the failing company doctrine; and that motion has not been decided.

New, pending—intervening the motion that I made directed to their subpoena, they have now filed with your Honor papers which are based upon Mosler's income tax returns for the period 1955 through 1959. They have an- [fol. 882] nexed to those papers the actual returns filed by Mosler with the Internal Revenue Service.

Mosler, as I indicated to your Honor, is a closely held corporation, owned by the family. None of the sales figures, none of the figures contained in its income tax returns, have ever been made public. It's of very——

The Court: Well, listen, is there any objection to suppressing that?

Mr. Nolte: Well, your Honor, the affidavit to which these returns are attached has as a part of it tables and charts, the figures in which are based on these returns; and those tables and charts are an integral part of the affidavit and of our opposition to the motion here.

Now, photostatic copies of the returns themselves were attached to the affidavit as exhibits to show the source of the figures used in the tables and charts and the authenticity of the figures. And I do have, if the Court please, something to say about the statutory basis and the basis in the Federal regulations regarding the publication of the returns.

The Court: Well, for the purpose of this suit here, the motion will be allowed; the papers will be suppressed——

Mr. Barton: Thank you, your Honor.

[fol. 883] The Court: —because, as I see it here, this case is going to turn on something other than the merits of the case.

Mr. Barton: Thank you, your Honor.

Mr. McGovern: Judge Druffel, could I make a suggestion in this regard that might help to solve this problem?

The Government has got this affidavit in by a man named

Neisser which tends to set forth these various ratios other than the ratios that we used ourselves going to the question of solvency. I don't think that that are very material or relevant, but anyway they are in there.

I wonder if it wouldn't solve the problem for all of us if I, on behalf of Diebold, were to undertake to stipulate with the Government that the ratios set forth in the Neisser affidavit are correct, accurate and true; and that would eliminate the necessity for these supporting papers.

I think what Mr. Barton is trying to get rid of are the schedules themselves. I would like to get rid of those too, frankly, because in so far as Diebold is concerned they do contain intimate tax figures that are not generally known; but I am willing to stipulate the accuracy of the ratios themselves in the affidavit. So I don't know that the Government has any need then to breach the confidential nature of the tax returns by bringing in the tax [fol. 884] returns themselves.

Mr. Barton: If your Honor please, I would like to have my motion go to suppressing any mention of Mosler's figures in the affidavit because, of course, if those figures remain in the record with regard to total sales, with regard to working capital, with regard to profitability, percentages of profit to sales, you might as well put the income tax returns in because that's showing the world the Mosler picture.

So that I think, your Honor, this stipulation could be made with respect to the parties with regard to Herring-Hall-Marvin and Diebold, but the Mosler figures themselves should be stricken from the record and suppressed.

The Court: Well, as I said before, for the purposes of deciding this case, the motion will be allowed.

Mr. Barton: Thank you, your Honor.

Mr. Nolte: Am I to understand, your Honor, that the motion will be allowed in the sense of suppressing the affidavit in its entirety, of which these figures are a part?

The Court: For the purposes of this cases, yes, because, as I say, we are not going into the merits of this case. I read and reread the International Shoe Company case, and I think this case has got to turn on the motion for summary judgment.

Mr. McGovern: Well, Judge Druffel, I only have one

[fol. 885] feeling about that myself, and that is that the Government may in this Neisser affidavit have material that they at least think has some bearing on the case. Now, I say I think myself that if there is anything in there, all it does it complement all our own showing.

It shows that this fellow Mosman was a miracle man. It shows that, with practically no money in the till, he was able to turn it over very readily, much more than ourselves; and all of them had substantial millions of dollars invested.

So I think myself that the Neisser affidavit, per se the affidavit, should stay in the record; and as I say, I am ready to stipulate on behalf of Diebold that the ratios set forth there are correct, accurate and true. Therefore, they could be suppressed without affecting the affidavit itself.

The Court: That's by way of a stipulation?

Mr. McGovern: Yes, sir. I would like just one qualification. I would like to ask the Government if they would also agree with me to stipulate one additional ratio which their economist for some reason didn't see fit to put in; and that is the ratio based upon gross profit.

The figures show—this is for 1958. The figures show that H-H-M had a gross profit—that is, the relation be-[fol. 886] tween their cost of sales to their sales and the resulting difference, which is gross profit—They had a gross profit of 31.4 percent. Diebold had a gross profit of 44.9 percent, and Mosler had a gross profit of 40 percent.

Now, I think that is a very material figure that should be in here as part of the stipulation if we are going to stipulate the accuracy of all the other ratios.

Mr. Nolte: Well, your Honor, I don't see how Diebold and the Government can stipulate as to the tables and the ratios in this affidavit without stipulating Mosler data; and I think it would be better if we left on your Honor's ruling suppressing the affidavit as such and we will preserve our objection to that ruling and let the matter stand there because, if you get into the Mosler figures, inevitably and unavoidably if you are going to take material out of that——

The Court: I don't see that it's really necessary about

the stipulation of that ratio because the evidence is in here.

Is this your judgment?

Mr. McGovern: I submitted a proposed judgment; yes, sir. But I am saying that proposed judgment was submitted on the basis of the showing the Government made, which does include this Neisser affidavit.

The Court: Well, I read it of course——

[fol. 887] Mr. McGovern: And I have, as I say, no objection—After all, I am the moving party on the motion for summary judgment. I have no objection to the Neisser affidavit itself staying in; and I would be prepared to stipulate, as I say, with the Government that every ratio, every fact or figure set forth in the Neisser affidavit is accurate and true.

I would like to add this one ratio as to gross profit before we suppress the tax returns and the supporting documents.

The Court: You still object?

Mr. Nolte: Yes.

Mr. McGovern: Well, you don't object to my suggestion, do you? I am not suggesting that we take out the Mosler ratios. I am suggesting we leave the Neisser affidavit intact——

Mr. Nolte: I understand that.

Mr. McGovern: —and I will stipulate that every fact and figure in the Neisser affidavit is true and accurate.

Mr. Nolte: Well, as I understand it, Mr. Barton's objection goes to the tables as well.

Mr. Barton: That's right.

Mr. Nolte: I don't think we can separate them.

Mr. Barton: I object to the Mosler figures being disclosed in this case on the meager showing that the Govern-

[fol. 888] ment is making that they must interfere with the competitive process by making public our figures. I don't think there is any ground for that in this case.

The Court: Well, I don't think it's necessary for the purpose of deciding this——

Mr. Barton: That's my point.

The Court: —because we have now ruled on the suppression; and the Neisser affidavit is a part of the record and we are taking that into consideration in deciding this.

Mr. McGovern: You are taking the Neisser affidavit into consideration?

The Court: Yes.

Mr. McGovern: Fine.

The Court: Well, now, where do we go from here?

ARGUMENT ON OBJECTIONS TO ROBINSON AFFIDAVITS

Mr. McGovern: The only other thing that I know, other than my motion for summary judgment, is a notice of a motion I just received this morning from Mr. Toohey in which he objects to two affidavits, short affidavits, that I filed on March 1st with my motion for summary judgment and the findings of fact and conclusions of law. Those are the two Robinson affidavits.

I suggest to you that under the rules, of course, I am entitled to try to meet their showing. If you believe Mr. Toohey, I have to sit here absolutely exposed down to the [fol. 889] day he files his affidavit and I am not entitled to anticipate or countervail anything he says.

Now, the Robinson affidavits do not bring in anything new that they didn't know about prior to March 1st. I gave a draft of the Robinson affidavit to Mr. Toohey or Mr. Nolte prior to February 21st. I am not sure which one of them got it. So as of that date they were on notice. That affidavit was designed to anticipate—and I think it does anticipate—the kind of a showing the Government was going to make.

The second Robinson affidavit does no more than try to make the same showing on the basis of the banks. In other words, they show the net balance in the Hamilton bank. We show a net balance in all the banks. That's all the second affidavit shows. And certainly I am entitled, your Honor, to try to countervail their showing.

Now, I don't engender an issue of fact. They don't say we do. He just says we have no basis for filing those affidavits on March 1st. On this basis I am sure he is absolutely wrong.

Mr. Toohey: May I speak to that, your Honor?

The Court: Yes.

Mr. Toohey: This motion to strike the two Robinson affidavits dated March 27 and the uncertified letter of

Lybrand dated March 1 arises from this situation: The [fol. 890] motion for summary judgment was served upon us on January 18. On February 13 we asked for further time and by an affidavit set forth facts which we felt supported our application.

Mr. McGovern, counsel for Diebold, vigorously opposed our motion for more time on the ground that we had had ample opportunity to look into this material; we had it for several months, beginning in December.

Further, on February 13 counsel for Diebold successfully obtained an order limiting the Government's examination of the bankers of the First National Bank and Trust of Hamilton to the year 1959 when, as your Honor can see by the defendant's moving papers supporting its motion for summary judgment, they go back to 1944 and they come forward as far as January 31, 1960.

We feel that some consideration should be given the Government, some opportunity to look at papers that are filed after January 18, to prepare for them. Our point is that if Mr. McGovern is going to insist that we should have been prepared thirty days or ten days from January 18, it is quite unfair that he should come forward with further affidavits after that time.

The Court: I don't see that you should take more than thirty minutes. You have read these and you complain about the lack of certification of Lybrand and Ross. I [fol. 891] assume that is what this letter is for?

Mr. McGovern: That's right, your Honor. Frankly, I didn't get that letter until March 1st because I didn't know what their position was going to be.

The point about the Lybrand-Ross reports, Judge Druffel, is that the Lybrand-Ross reports are brought forward merely as exhibits. They did a mathematical job for us. That's all they did.

We didn't ask them to certify, your Honor, that this was a failing company, unlike the Government's affidavit from their economist, because we felt that the determination of a failing company is for your Honor; it's not for Lybrand-Ross or for an economist of the Department of Justice.

We brought in the Lybrand-Ross reports as exhibits to

the affidavit of Mr. Frank Robinson, and Mr. Frank Robinson can testify of his own personal knowledge, which is more than Mr. Toohey's man can do.

Mr. Toohey: We have two more objections to the Frank Robinson affidavit dated February 27 and that is, as the plaintiff's objections to the proposed findings which we filed this morning and served upon counsel for both defendants—as pointed out in those objections, the defect in the Lybrand reports, and especially that of December 8, 1960, appears also in the Frank Robinson affidavit relating to a number of checks purportedly written and released [fol. 892] and canceled as of various dates.

I think the fundamental unsatisfactory nature of the Lybrand report which states that no detail is available, checks not yet released, nor of checks released and yet outstanding, applies just as strongly to the Robinson affidavit.

For that reason we oppose the filing and consideration of the two Robinson affidavits, February 27, and the Lybrand letter, first, because they are untimely; secondly, because they each contain the fundamental defects that appear in the Lybrand report of December 8, 1960.

That is pointed out, your Honor, in our objections to proposed finding number 3. We state in our objections that we object not merely on the ground that the Lybrand report of December 8 is incompetent under the rules because it's neither certified nor sworn to, but further that that Lybrand report, nor this further Lybrand letter of March 1st subject to our motion to strike now, does not offer a satisfactory explanation to this Court on this record of how Lybrand can determine whether the internal book accounts are in fact the actual cash balances of the company at that time. They say themselves that no detail is available—was available to them at that time—of checks written but not yet released or of checks released but yet outstanding as of the respective dates.

The Court: Well, they do reflect the status of the books though, don't they?

[fol. 893] Mr. Toohey: We feel they do not, your Honor.

Mr. McGovern: Your Honor, could I be heard just briefly on this last point made by Mr. Toohey?

This Lybrand-Ross report is perfectly clear on this. We have tried to explain it to Mr. Toohey, Mr. Nolte,

from time to time. Frankly, sometimes I may have confused them by the way I put it; but the Lybrand-Ross report is perfectly clear, your Honor.

What this company did, your Honor: Whenever they had a bill that matured, they wrote a check on their company's books, but they didn't have money in the bank to cover the check and they knew it, so they put it in what they call the little black box and the check was kept in that box until some future time where the management had decided that they had enough money coming in from some place that they could put that check out in flow.

Now, what Lybrand-Ross is saying here is perfectly clear. When they say, "No detail is available of the checks not yet released," that means the checks that are still in the box, that never did get out in flow; "or of those released," that is the ones that got out of the box and were still outstanding, which means they hadn't cleared the bank.

Now, what Lybrand-Ross shows, your Honor, is the checks that were released, that got out of the box and [fol. 894] got back into the bank before the Lybrand-Ross audit because they had the bank's cancellation on the back of them. Even though the company's books did not show they were released, the fact that they had the bank's cancellation on them proves they were released because they had cleared the bank.

Now, what this means—and Mr. Toohey ought to realize this—is that Lybrand is saying that "We can give you a minimum figure on the outstanding checks not covered by this money in the banks but we can't tell you the maximum because he might have had hundreds of thousands more outstanding." Unless the checks had cleared the bank, Lybrand-Ross does not take that into account.

Now, it's just as simple as that.

Mr. Toohey: May I answer that, your Honor?

What Mr. McGovern says may be perfectly true with respect to checks written, released and still outstanding. His statement just now, the Lybrand letter of March 1st and the Lybrand report of December 8 do not answer a more fundamental question: What has Lybrand done or been able to do with checks released—excuse me—checks written, debited against the internal book cash balances and put in the black box?

Mr. McGovern: And the answer is, your Honor, nothing. They say, "We can't certify a thing about this"; and I [fol. 895] haven't used a single figure based on such checks.

Mr. Toohey: Then I suggest, your Honor, it may be a fair inference that if a witness could be called from Herring-Hall-Marvin, some man who knew the operation—and I am not familiar with the names; it may be a man named Schlagel; it may be a man named Yaup—could say whether the true cash balance as reflected by the internal books of account would show more money by adding those checks written but not released to the internal book accounts.

The Court: Yes. But is that a good practice for a solvent company to be doing that?

Mr. Toohey: Your Honor, it is our contention throughout the papers we have filed in opposition to this motion that this situation should not be considered or turn on one single fact. We feel that all aspects and facets of this company's operation should be considered; no one single fact can determine whether a company is insolvent or bankrupt.

The Court: Well, let me read this letter, will you, of Lybrand-Ross of March 1st for a minute? (Examining document.)

All right; go ahead.

Mr. Toohey: If I may comment on the Lybrand March 1 letter, your Honor, the very last paragraph says, "nothing came to our attention which would lead us to believe that [fol. 896] the outstanding checks on the respective dates did not total at least the amounts reflected in the reconciliations," et cetera.

What they are there talking about are checks written, released and still outstanding. They say nothing there in this letter about checks that were written but not yet released.

The Court: Well, how could they pick that up if they were keeping all their—Well, I am inclined to talk about check kiting.

Mr. McGovern: "Check floating" is a more euphemistic term, I think.

The Court: We will adopt the "check floating" then. They are just a step away from kiting though.

If that is going on, how can somebody come in off the

street and go over the books? How are they going to find out if they are keeping it secret?

Mr. Toohey: Your Honor, it's our suggestion in our memo and in the objections to proposed findings of fact that no one here on this record can determine that.

The Court: Can do what?

Mr. Toohey: Can determine the answer to that question, how those checks were handled in fact.

Mr. McGovern: But I am suggesting, Judge Druffel, as you point out, checks that were written and then [fol. 897] sort of kept in the bosom of the company, of course we don't know about that. But I haven't made any point about that. I am talking only about the checks that were written; they were put in the black box and then they were taken out on the float and they cleared the bank prior to the time when Lybrand-Ross audited them because Lybrand-Ross looked at the cancellation on the back of each check. Those checks they knew about because they had cleared the bank. That's all I am asking you to make a finding on.

The Court: Let me ask a question. Just bring me up to date on that $56,000 payroll check that couldn't clear.

Mr. McGovern: Yes. There is no question about that. Lybrand-Ross is absolutely accurate about that. What the company would do is that on Friday night they would write checks for whatever their payroll that Friday was, 56,000 let's say, and on that date they wouldn't have more than 10 or 15 thousand dollars in their payroll account. They would deposit a check in that payroll account, dated the same date as the payroll itself, for, let's say, 10,000, and then on subsequent dates, the rest of the week, they would write additional checks in the hope that those checks would enter the bank in time to cover the payroll.

Now, those checks themselves were written on the general account in the same bank, which was also overdrawn. [fol. 898] We know this is so because those checks also cleared the bank in advance of the cancellation. But by virtue of this very judicious use of the flow, you see, they were able to keep one step ahead at all times. In a rather magical fashion they kept one step ahead of all of those checks coming into the bank on a day when there weren't funds to cover them.

The Court: What about that $22,000?

Mr. McGovern: There is no question about that because Mr. Toohey has the checks. He knows about that. The bankers testified about those checks. They were identified in the record.

Mr. Toohey: Are you referring, your Honor, to the checks described in the Robinson affidavit of February 27 where he says $34,000 checks were written and created a float?

The Court: Yes.

Mr. Toohey: May I say this on that, your Honor? Nowhere in this record are there any ledgers or statements showing that on the books of any of those banks there existed a credit to the account of H-H-M of $34,000 as of February 2, 1959.

Mr. McGovern: Mr. Robinson's affidavit—This they can have no objection to. Mr. Robinson's affidavit states that of his own personal knowledge that that credit was shown: [fol. 899] and those statements and those checks were made available to the Government.

The Court: Well now, was this the kind of a system—I noticed all through here what we talked about the other day; a $34,000 check was deposited first from Wells Fargo, and then a check on the Irving Trust for the same amount took that out of the Wells Fargo, and in turn a check was drawn on Peoples for 34,000. Was that the same $34,000?

Mr. McGovern: The very same 34,000.

The Court: Well now, that was January 30, '59. Now, 2/17/59, it looks like the same system covered for 31,000. Is that the same deal?

Mr. McGovern: Same deal, exactly.

Mr. Toohey: Your Honor, I would ask a question of counsel, if I may. Are the ledger statements of Wells Fargo, Irving Trust, Peoples and the First National—Yes, I will admit the First National—Peoples, Irving Trust and Wells Fargo—are those ledger statements in the record?

Mr. McGovern: Yes. Let's be absolutely clear about this. If you recall—or was it Mr. Nolte that I gave a draft of this Robinson affidavit to, not on March 1st, but

on February 21st, the day before Mr. Boyce came to town. Does that fix it in your mind?

At that time I sent you down the bank statements from [fol. 900] Wells Fargo, Irving Trust, Peoples and First National, and I sent you down the checks showing these very facts.

Mr. Toohey: Do we have the ledger statements of the bank?

Mr. McGovern: Yes. Isn't that correct, Mr. Robinson?

Mr. Frank D. Robinson: Yes.

Mr. Toohey: Do we have the customers' statements or do we have the ledger statements of the banks themselves?

Mr. McGovern: You have the bank statements given by the banks to the customer, H-H-M, which is the same thing, as you know, as the ledger statement that the bank has.

Mr. Toohey: But not the ledger statements?

Mr. McGovern: No. We don't have the ledger statements. But I am saying that I gave you the statement they gave the customer. Now, there is no possibility of questioning the accuracy of that statement. I gave you the checks at the same time, February 21st; not today and not March 1st.

The Court: I want to ask you another question. Do you want to make a statement of the picture that these floating checks made that were in these banks, what they [fol. 901] were supposed to do or what they were supposed to create in the minds of the bankers?

Mr. McGovern: Your Honor, it seems to me perfectly clear on the face of it that these floating checks did one thing to begin with. Had he taken that check from Wells Fargo—Let's take the one check for 34,000—well, take any of these; take the first one over there on the first page for $22,500. Had he taken that check from Wells Fargo and deposited—not the check—but had he written a check on Wells Fargo and deposited that in his local bank, that would have cleared in two or three days normally.

Now, the one thing it seems to me that he did accomplish is by taking a check on Wells Fargo and depositing it in Peoples, and then one on Peoples and depositing it in Irving Trust, and then one on Irving Trust into the First National—the obvious thing that was accomplished was

that lead time was added for clearance because all the banks had to clear those checks.

The Court: They are all dated the same day.

Mr. McGovern: Certainly, they are all dated the same day, but each bank cleared on the same day. The clearance has to catch up with the other going around in a circle, even though they are on the same day.

The second thing that he accomplished is that if you were to pull a statement off of any of these banks on, [fol. 902] let's say the first situation, on January 3d, you would have found that all of those banks showed an additional $22,500.

Now, supposing a creditor were pressing him and said, "Are you broke? Can you pay your bills?" he could have gotten a telegraphic confirmation from all three banks showing that he had $22,500 additional. Now, of course, as soon as the clearance took place, that would have been wiped out, but a creditor wouldn't know that. He would have no way of knowing it.

So, again I say it was just a part of the over-all picture of floating checks, which gave him inflated balances. There is just no argument about it. He was able to inflate his bank balances by this constant movement of checks in circulation.

That, incidentally, of course, your Honor, is the reason why their affidavit shows he did so well in terms of turning over his limited capital, in terms of sales and so forth. He was using this flotation to do it. Really, he was borrowing money from his banks and from his creditors and paying nobody any interest because of this floating proposition.

Mr. Toohey: One, he was borrowing very little in 1959 from his banks. Secondly, this run of checks purportedly creating a float, I would ask Mr. McGovern how this washes out in view of the Lybrand certified report of January 30, [fol. 903] 1959.

Mr. McGovern: Checks in perfectly. What's your specific question?

Mr. Toohey: At that date this company was certified by Lybrand to show so much cash on hand, certain assets, free of long-term debt. The balance sheet doesn't show insolvency. It doesn't show in bankruptcy.

Mr. McGovern: Let's come, Mr. Toohey, to page 2 of this letter dated March 1st from Lybrand-Ross. You have been saying you want a certification of some kind. This, mind you, is a certified statement as of June 30th. It's certified because it is taken from the work sheets of Lybrand-Ross in connection with their certification of H-H-M's balance sheet of June 30th. This is certified. They so state. Read the first paragraph up there. It says:

"* * * the following certificate with respect to the financial statements for the year ended June 30 * * *"

Now, is certification going to make you happy? This was certified, this much. You will note that this page and the next page shows that again. When they went in to examine the Herring-Hall-Marvin books they found that there were checks outstanding that hadn't been debited; and when they debited those checks they found this situation down here, your Honor, an overdraft on the Hamilton National Bank of $10,916.00.

[fol. 904] Now, they were able to certify that, your Honor, by virtue of the preceding statement, "Checks released prior to July 1, 1959, but not recorded in the general ledger prior to that date"; and the way they knew they were released prior to July 1st is because they looked at the cancellation on the back of the check and, since it had cleared the bank, they knew, of course, that it had been in circulation.

Now, again, even as of this date, mind you, they didn't know how many more thousand were outstanding because if they hadn't yet cleared the bank, there was no way Lybrand-Ross could tell whether they had been released from the black box.

But I am saying that goes to maximize the situation. It doesn't minimize it. Lybrand-Ross shows the minimum situation.

The Court: Well, there is one other item that I would like clarified at this point. When H-H-M suggested that they had so much money in the bank and they actually had $13.00; then there was a deficit, wasn't there, after the deal was closed?

Mr. McGovern: Yes. Well now, we had several situations like that, and Lybrand-Ross covers all of those. Again

I say the Lybrand-Ross reports are brought forth just as exhibits, just as Mr. Toohey has brought forth several pounds of this stuff. Is this personal knowledge of some-
[fol. 905] body? Is a reference book of Dun & Bradstreet personal knowledge of the accountant? Of course not. I don't object to it. The economist says he thinks it's true. That's good enough for me.

Now, on June—on April 30th he gave us a balance sheet. This is set forth in the Lybrand-Ross report. He gave us a balance sheet showing about $115,000 in cash. Subsequently—We are not clear about the date, but at some time toward the end of apparently May or the first part of June, before we signed the option, he told us that he couldn't warrant it.

The Court: Couldn't what?

Mr. McGovern: He could not warrant it.

The Court: He couldn't warrant it.

Mr. McGovern: This was a so-called internal balance sheet. This was not done by Lybrand-Ross. He said he couldn't warrant it because he had undertaken for the purpose of that balance sheet to reclassify $100,000 of receivables into cash; but he assured us those were good receivables and there was nothing to worry about, they would be cash shortly after that date. He did not disclose to us that he had an additional $25,000 in checks out in this floating area.

Now, the Lybrand-Ross report does show that by using the same technique they used on this April 30th balance
[fol. 906] sheet. They looked at the cancellation on the back of the checks. Where those checks had cleared the bank prior to April 30th they knew that they had gotten out of the box and were into circulation.

So, instead of having a balance of $115,000, even if you were to make allowance for the 100,000 receivables, he actually was overdrawn by $15,000; he had a bad figure of $15,000.

Now, coming down to this date of September 3d, another instance where your Honor recalls—Frankly, the first knowledge—I want to state this for the record. The first knowledge I ever had of this thing myself in the sense of the grave picture we can present here today was that balance of $13.92.

Now, you will recall, your Honor, back on November 16th I used the figure of $13.92 to show how low his balance, even on the bank statements, had fallen. I tell you now as an officer of this Court that at that moment I did not know just how bad the situation was.

It wasn't until Lybrand-Ross went in that we discovered on that very date, for example, that instead of having $13.92 which was shown by the bank, he had actually overdrawn in excess of $50,000.

The Court: That's what I wanted to know. I think that's important to this case here.

[fol. 907] I am ready to decide this case. I don't want to be short.

ARGUMENT ON OBJECTIONS TO PROPOSED FINDINGS

Mr. Toohey: We would like your Honor to give some consideration to our objections to the proposed findings. They are detailed.

The Court: All right—No. I tell you, we like to go along this way, that you will still have a right, even after we move today, to offer proposed findings of fact by the Government here on this subject.

Mr. Toohey: Your Honor, we don't feel that findings of fact should be forthcoming from the Government on this point. It is the defendant's burden to carry through in all respects on his motion. The rule specifically states that findings of fact are not necessary on a Rule 56 motion.

The Court: Well, that may be so. But I still think that the upper court, if it goes to the upper court, should know what we are doing here and what we are thinking about.

Mr. Toohey: Are you suggesting, your Honor, that the Government undertake to submit its own proposed findings of fact?

The Court: I didn't hear what you said.

Mr. Toohey: Are you asking us to submit our own proposed findings of fact——

[fol. 908] The Court: Yes.

Mr. Toohey: —beyond the objections we have made to Mr. McGovern's?

The Court: Well, you may if you want to. You don't have to. You don't have to do that.

Mr. Toohey: And this will be after your Honor has rendered a decision on the motion?

The Court: That's right.

Mr. McGovern: May I, your Honor, again, so that the record will be clear on this, just advert to one remark made by Mr. Toohey?

This is a repetition of what he has said earlier that under Rule 56 you are not required to file findings and conclusions. It's true under the rule you are not. But the Government in the last three cases they took themselves on summary judgment did file proposed findings and conclusions.

And the findings and conclusions I have submitted, your Honor, are exactly modeled after the one in Northern Pacific, the last one in the Supreme Court two years ago in which the Government itself won on a motion for summary judgment.

The Court: Well, of course the Sixth Circuit sometimes sends a case back because findings of fact haven't been filed, and then the next session they come in and say that they were not necessary.

[fol. 909] Mr. McGovern: Well, I agree with the Court, that how would the Supreme Court know the basis for your judgment without findings and conclusions. The Government has adopted that practice. I don't see how they can possibly object to our filing them here.

Mr. Toohey: Just to clear one point of confusion: In those cases the Government was the moving party. In this situation we are the opposing party. I was merely trying to clear the confusion in the Court requiring the Government to file proposed findings of fact and conclusions.

Mr. McGovern: I beg your pardon. If all Mr. Toohey is saying is that he has no obligation to file them, I agree he doesn't. I filed them. I think your Honor is merely tendering him the opportunity if he wishes.

The Court: That's exactly right.

Now, let's see, we have "Plaintiff's objection to Defendant Diebold's proposed findings of fact and conclusions of law." We will have to make a ruling on that first, and that is that plaintiff's objections to the proposed findings of fact are overruled. So, if we find an entry necessary, we will have to hand it out.

Now, where is your motion? I haven't seen this motion.

Mr. McGovern: I filed the motion back on January [fol. 910] 13th, your Honor. That was filed with our showing and so forth (handing papers to Court). Notice of motion is attached.

The Court: All right. Now, this has been filed?

Mr. McGovern: Yes, sir.

The Court: Were you going to say something?

Mr. Toohey: I have one further question. When may we have the opportunity—or how long may we have the opportunity to work up our findings of fact and submit them to this Court?

The Court: That's up to you now because you are on your own now. You will simply tender them and I will mark them "Have seen" and let it go at that.

Mr. Toohey: We appreciate your Honor's extension of the opportunity. We just merely ask for how long a period of——

The Court: Thirty days?

Mr. Toohey: Thank you.

The Court: Well, all right. The motion for summary judgment will be allowed within the principles enunciated by the International Shoe case, 234 U. S. 291; and, of course, you understand from that this case turns strictly on the principle there that this was a failing company, and we do not go into the merits of the competitive feature. [fol. 911] Does that cover the whole story?

Mr. McGovern: That's right. In other words, you are granting the motion for summary judgment and we will notice an entry of that on the docket?

The Court: That's right. We need an entry now to follow this judgment.

Loan me your pen.

Mr. McGovern: May I just correct the record in one respect? My copy of Supreme Reporter shows the citation of International Shoe as 280 U. S.

The Court: 280?

Mr. McGovern: 280, yes.

Mr. Toohey: Your Honor, before the date is put on the judgment, may I again advert to the opportunity you very kindly extended to the Government to file proposed findings of fact and conclusions of law? Will the inde-

ment entry be entered prior to the time our findings are submitted to——

The Court: You will have to speak louder or plainer.

Mr. Toohey: You have given us something like thirty days——

The Court: Yes.

Mr. Toohey: —your Honor, to file our own findings of fact and conclusions of law. Will this judgment entry [fol. 912] be filed prior to the time our findings are filed?

The Court: As soon as he gets it, we will sign it. You will be in the position of filing a motion for a new trial. That's the effect of your tendering your proposed findings of fact.

So when we get the entry carrying this into effect, we will sign it; you will have thirty days after that in which to prepare your findings of fact.

Mr. Nolte: Does the Court propose to sign and enter the findings of fact and conclusions of law as proposed by Diebold?

The Court: Yes.

Mr. Nolte: And the judgment submitted by Diebold?

The Court: We will put these findings of fact and conclusions of law on today; and whenever the entry comes, we will sign that.

I just wonder here now. This letter of Lybrand-Ross of March 1st and the affidavit of Robinson should be made a part of the record.

Mr. McGovern: Yes, they should, your Honor. I should like to file those as part of the record.

The Court: Have Mr. Crawford mark them.

Mr. Monroe: If your Honor please, I on behalf of Mosman Industries, Herring-Hall-Marvin, filed a motion to [fol. 913] strike parts of Mr. Neisser's affidavit. That problem has now been taken care of by your ruling on Mr. Barton's motion; and I think the proper thing for me to do would be simply to withdraw that motion.

The Court: That's up to you.

Mr. Monroe: I would just like the record to show that it's been withdrawn in open Court.

Mr. McGovern: Your Honor, there is only one thing that I think is still open on the record. Mr. Toohey and Mr. Nolte served a notice to admit on me to the effect that

there were different figures available from the H-H-M tax return than from the H-H-M annual report. The annual report is of June 30th each year. He was reporting on a fiscal basis. The September 11th, 1959 tax return is an absolutely different figure because there is a tax adjustment.

I asked Lybrand-Ross, who prepared them both—They prepared his June 30th annual statement; they prepared his September 11th tax report—to reconcile those figures. They have done so in a thing called "Special Reconciliation Schedules, year ended June 30, 1959." I gave a copy of this to Mr. Nolte sometime back and suggested he consider this my answer to his motion to admit. I admit the figures.

I simply say here is the explanation for the differences. I should like to file this as part of the record too unless [fol. 914] Mr. Nolte has some objection.

Mr. Nolte: Let's correct one item, if we may.

Mr. McGovern: Yes.

Mr. Nolte: You admit the figures set forth in our request for admissions with one exception.

Mr. McGovern: That's right.

Mr. Nolte: We set forth a net worth figure of, I think, $110,000—It's right here (indicating).

Mr. McGovern: Oh, yes.

Mr. Nolte: And we are agreed and I think we can—This is something we can stipulate to right here.

Mr. McGovern: All right. That Lybrand-Ross is right.

Mr. Nolte: We are agreed that that figure should be $186,939, which is the net worth figure as at June 30, 1959.

Mr. McGovern: All right.

Mr. Nolte: And the parties are agreed that with that admission the request for admissions is admitted.

Mr. McGovern: Yes. Then, Mr. Nolte, may I request that you permit this to be filed in the record as my formal answer?

Mr. Nolte: Yes.

The Court: Well, do you want to give it to the reporter to have it marked?

[fol. 915] Mr. McGovern: Yes, I would like to.

The Court: Well, the Clerk will mark it filed, but I think it ought to be marked as an exhibit.

Mr. McGovern: All right.

(Thereupon, document entitled "Herring-Hall-Marvin Safe Company—Special Reconciliation Schedules—year ended June 30, 1959" was marked Defendant Diebold's Exhibit XX for identification, was offered and received in evidence and is made a part of this record.)

Mr. Barton: May I ask, your Honor, what is going to happen physically to this Neisser affidavit to which the returns——

The Court: I said for the purposes of this case it would be suppressed.

Mr. Barton: Yes. Now, what will be the disposition of it in this record? You see, what I am concerned about is that that not become public information. All counsel have agreed that we are not giving our respective clients the information.

The Court: Can it be detached from the file and give it to the Clerk to be sealed?

Mr. Barton: I think that's the only thing that can be done.

Mr. McGovern: I understood you to say that the Neisser affidavit for the purpose of this motion has been con-
[fol. 916] sidered.

The Court: Yes, had been considered.

Mr. McGovern: Had been considered, yes. And you now want to seal it.

The Court: Now, Mr. Ebel, you will detach this from the file here and seal it and then attach the sealed envelope, with the affidavit in it, to this file.

Mr. Barton: That's right. I think that's the only practical way to handle it.

Mr. Nolte: Well, Mr. Barton, in that event, don't you want the parties, the defendants, to turn in their copies to the Clerk to be sealed also?

Mr. Barton: Yes, I think that should be done, including the Government's.

Mr. McGovern: I am prepared to do so. That has been turned in, the supporting schedules, but not the affidavit itself, which I need for working purposes obviously.

The Court: All right.

The Clerk: If you gentlemen will come to the Clerk's office following——

Mr. Nolte: The Government will be glad to turn in a copy, but we don't have the original certifications from the Commissioner of Internal Revenue here. We will be glad to turn in our copy of the affidavit as filed.

[fol. 917] Mr. Barton: Very good.

The Court: There is going to be a lot of copies here. Where is Mr. Monroe's copy?

Mr. Monroe: (Indicating.)

The Court: I think that you had better sign this (indicating).

Mr. McGovern: Yes. I think it ought to be signed, your Honor, certainly.

Mr. Nolte: Is yours in the office?

Mr. Monroe: In the office.

Mr. McGovern: May I say off the record here——

(Discussion off the record.)

Mr. Nolte: We will turn ours over as soon as the defendants do.

The Court: You better let Mr. McGovern—He didn't sign that.

Mr. McGovern: I thought I did. I thought I did sign the motion.

I will now get together with the Clerk and decide about an entry. I don't know what your practice is about entries and judgment.

The Court: I guess that is about as far as we can go. We will recess until 2:00 o'clock today.

(Thereupon, at 11:53 o'clock A. M., the hearing in the above-styled action came to a close.)

[fol. 918] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

[Title omitted]

ORDER EXTENDING TIME TO DOCKET CASE AND FILE RECORD—June 20, 1961

The time within which to docket the above case and to file the record thereof in the United States Supreme Court is hereby extended to and including August 4, 1961, in accordance with the provisions of Rule 13 of the Revised Rules of the Supreme Court.

John H. Druffel, U. S. D. J.

Dated: June 20, 1961.

Consented to:

John M. Toohey, for the United States.
Victor H. Kramer, for Diebold, Inc.
Murray S. Monroe, for Herring-Hall-Marvin Safe Company.

[fol. 919] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil No. 4485

UNITED STATES OF AMERICA, Plaintiff,

v.

DIEBOLD, INCORPORATED AND HERRING-HALL-MARVIN SAFE COMPANY, Defendants

ORDER DISMISSING COMPLAINT AGAINST HERRING-HALL-MARVIN SAFE COMPANY—Filed June 23, 1961

Whereas, plaintiff having moved for an order dismissing the complaint in the above case as against defendant Herring-Hall-Marvin Safe Company (now known as Mos-

man Industries, Inc.) on the ground that the interests of justice no longer require retaining said defendant as a party;

Now, Therefore, it is ordered that the complaint against Herring-Hall-Marvin Safe Company be and is hereby dismissed.

John H. Druffel, U. S. D. J.

Dated: ——.

[fol. 920] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil No. 4485

UNIED STATES OF AMERICA, Plaintiff,

v.

DIEBOLD, INCORPORATED, Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 3, 1961

I. Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the United States from the Judgment entered in this action on March 8, 1961 granting defendant Diebold's Motion for Summary Judgment, which Judgment became final upon the dismissal on June 23, 1961 of the complaint against defendant Herring-Hall-Marvin Safe Company.

This appeal is taken pursuant to 15 U.S.C. 29.

II. The clerk will please prepare a transcript of the record for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the entire District Court record in this cause, as specified by the parties hereto in the Stipulation dated June 23, 1961. This Notice of Appeal should be included.

III. The Questions Presented: In this action which was brought by the United States under Section 7 of the Clayton Act, one of the three major firms engaged in the manufacture of bank vault equipment and related prod-

ucts purchased the assets of another of the three companies. Holding that this Court's decision in *International Shoe* v. *Federal Trade Commission*, 280 U.S. 291, was a defense to the action, the district court granted the defendant's motion for summary judgment. It concluded that the acquisition was no threat to a lessening of competition on the grounds that the acquired corporation was hopelessly insolvent and could not have survived as a competitor and that there was no possibility of its accomplishing a reasonable sale to anyone else. The questions presented are:

[fol. 921] 1. Whether the district court misconceived the nature of this Court's decision in *International Shoe* when it dismissed the complaint in this case upon the basis of findings which gave an incomplete picture of the acquired company's financial status and ability to continue as an active competitor and which among other things ignored undisputed facts of record showing that the acquired company in 1959 had the third highest net sales in its history (only 6% below its peak year in 1957); in each of the five years preceding the acquisition the company earned profits both before and after taxes; its rate of return on investment in 1959 was about 20% before taxes and about 9% after taxes; the company's retained earnings account increased from about $1¼ million in 1954 to about $2¼ million in 1959; its working capital position improved from a ratio of about 1.36 in 1957 to 1.77 in 1959; for the fiscal year ending June 30, 1959 it had reduced its loans payable by more than half and was completely free of long-term debt; and there were at least three other prospective purchasers, none of whom were competitors and one of whom was negotiating and attempting to make the purchase until the time of the acquisition.

2. Whether in any event summary judgment was appropriate in the circumstances of this case.

John M. Toohey, Attorney, Department of Justice.

[fol. 922] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 286

UNITED STATES, Appellant,

vs.

DIEBOLD, INCORPORATED

ORDER NOTING PROBABLE JURISDICTION—November 6, 1961

Appeal from the United States District Court for the Southern District of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

November 6, 1961.

U. S. GOVERNMENT PRINTING OFFICE 1961 O-717418

[fol. 598] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil No. 4485

UNITED STATES OF AMERICA, Plaintiff,

v.

DIEBOLD, INC. and HERRING-HALL-MARVIN SAFE COMPANY, Defendants

AFFIDAVIT—Filed March 1, 1961

District of Columbia, ss:

ALBERT C. NEISSER, being first duly sworn, deposes and says:

1. I am employed in the Antitrust Division of the Department of Justice as a Business Economist. I have been in that position since May 1957. Prior to this time I was employed by the United States Treasury Department from December 1949 to May 1957, first as Fiscal Economist on the Tax Advisory Staff of the Secretary of the Treasury, and beginning with April 1953, as Economic Advisor to the Excess Profits Tax Council of the Internal Revenue Service. Before entering Government service, I held various positions with private employers. From November 1945 to December 1949, I was Staff Economist in the firm of Milton M. Bernard, Tax Consultant and Certified Public Accountant; from February 1944 to November 1945, I was head of the statistical department of the firm of Imrie de Vegh, Consulting Economist and from July 1942 to February 1944, I was Research Assistant and later Economic Analyst with the Econometric Institute in New York City. In all these positions I was called upon to compile, interpret, and analyze economic data relating to individual companies, entire industries, and the national economy as a whole.

[fol. 599] 2. I am associated with Messrs. Walter T. Nolte

and John M. Toohey, Jr. in the above entitled case. Among the documents which I have examined and analyzed are:

a) Certified copies of federal income tax returns filed by the defendants, Diebold, Inc., (hereinafter referred to as Diebold) and Herring-Hall-Marvin Safe Company (hereinafter referred to as HHM) as well as by the Mosler Safe Company (hereinafter referred to as Mosler). The returns filed by Diebold and Mosler cover the calendar years 1955 through 1959, inclusive. The returns filed by HHM cover the fiscal years ended June 30, 1955 through June 30, 1959, inclusive. The pertinent portions of these returns are attached as Exhibits 1 to 15.

b) Photostatic copies of reports filed by defendants with the U. S. Department of Commerce, Bureau of the Census, attached as Exhibits 16 and 17.

c) Certified photostatic copies of certain pages of the "Reference Book" of Dun & Bradstreet, Inc., issued for March, July, and September 1959, attached as Exhibits 18 to 20.

3. The purpose of this affidavit is to present facts which, in my opinion, contribute to a determination of whether or not the acquired company (HHM) was in a failing condition at the time of the merger.

4. In short, my conclusions are that, before the merger, HHM was in a sound financial condition,

it had had a profitable financial history during the five years preceding the merger,

its balance sheet as of June 30, 1959 showed it to be free of long-term debt,

a number of tests applied customarily by accountants and economists reveal that the company had been operated with effective use of its financial resources,

[fol. 600] its credit rating, as revealed by a generally consulted source was either good or better,

its sales in major product lines, from 1954 to 1958 had grown faster than the sales of such products made by all American producers.

Specifically, as a competitive factor, the acquired company increased its share of the shipments by all producers

of fire-resistant safes, burglary-resistive safes and chests, safe deposit boxes, and "all other" bank and security vaults and equipment from 1954 to 1958, the last full calendar year preceding the merger for which census information is available.

5. The brunt of defendant Diebold's presentation is that a company with a cash position as impaired as that of HHM at the time of the merger is to be considered as finding itself "in a failing condition."

6. Prior to embarking on detailed proof of these points, however, it should be emphasized that papers in support of the Motion for Summary Judgment do not, in my opinion, establish that HHM found itself in a critical cash position.

7. Also, a letter dated January 3, 1961 addressed to Mr. F. D. Robinson by Lybrand, Ross Bros. & Montgomery and attached to defendant Diebold's motion papers offers a comparison between certain ratios derived from HHM's balance sheets and from balance sheet information reported to the Securities and Exchange Commission and to the Federal Trade Commission and published by these government agencies in their Quarterly Financial Reports.[1] [fol. 601] The letter labels the ratios as ratios of "Fabricated Metal Products" (up to the end of 1957) and of "Other Fabricated Metal Products" (beginning with 1958); these categories are classified as Major Industrial Group No. 34 of the Standard Industrial Classifications of the U. S. Bureau of the Budget. The complete list of companies belonging to the Major Industrial Group No. 34 and reporting to the Securities and Exchange Commission in 1958 and 1959 is shown in Appendix Schedules 1 and 2.

In addition to these companies the financial data published in the Quarterly Financial Reports for Manufacturing Corporations reflect an unknown number of corporations which are under no obligation to report their financial status to the Securities and Exchange Commission. The

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[1] Quarterly Financial Report for Manufacturing Corporations, Federal Trade Commission-Securities and Exchange Commission; Superintendent of Documents, Washington, D. C.

Federal Trade Commission has designed a sample of non-reporting corporations on the basis of which information is developed which is integrated with the information described above. The Federal Trade Commission does not publish the information collected by them separately from the joint reports with the Securities and Exchange Commission and the corporations included in their sample are not revealed to the public.

Based on the set of statistics described above, Lybrand, Ross Bros. & Montgomery compare HHM's ratio of cash and Government securities to current liabilities to that shown for the major industrial group No. 34 and HHM's ratio of current assets to current liabilities to the corresponding ratio of the major industrial group. In the light of this comparison, HHM's ratios appear low.

8. The significance of this comparison for the establishment of the fact that HHM was in a failing condition appears open to question for two main reasons: First, the validity of the industry comparisons themselves is doubtful and second, the weight to be attributed to the two particular [fol. 602] ratios singled out from a large number of possibly more meaningful relationships has not been demonstrated.

First, as an inspection of Appendix: Schedules 1 and 2 reveals, none of the companies well known for their production of safes and vaults are among the names listed. The major industrial group no. 34 is composed of a great many heterogeneous types of establishments. Manufacturers of heating apparatus, for instance, or companies like the American Can Company or the Continental Can Company sell to a group of customers entirely different from the circle of customers served by the defendants. Moreover, from a statistical point of view, the addition of total cash and Government securities owned by these companies and the division of the sum by the sum of the total current liabilities owed collectively by all these companies tends to blur rather than reveal a meaningful accounting picture. The amount of cash held and its relationship to current liabilities varies significantly from industrial group to industrial group, from industry to industry, and from corporation to corporation.

To illustrate this argument, reference is made to data

published for two other major industrial groups in the Quarterly Financial Report For Manufacturing Corporations, First Quarter 1960. This report reveals that the major industrial group of "Aircraft and Parts Manufacturers" had a ratio of cash and government securities to current liabilities of no more than .12 in each of the four quarters of the calendar year 1959 and a current ratio of from 1.43 to 1.47. By contrast, the same ratios for the major industrial group called "Primary Iron and Steel" fluctuated between .90 and 1.29 for the cash ratio, and between 2.61 and 3.04 for the current ratio. It would, obviously, be erroneous to deduce from these figures that manufacturers of Aircraft and Parts are in a failing condition while manufacturers belonging to the major industrial [fol. 603] group of Primary Steel and Iron are financially sound. A great many more facts need to be known to reach such a conclusion.

The explanation, at least in part for the ratio variance between the Aircraft and Parts and the Primary Iron and Steel industrial groups seems to lie in the fact that receivables from the United States Government represented from 14.6 to 16.7 percent of the total assets of the Aircraft and Parts industrial group, but only one tenth of one percent of the total assets of Primary Iron and Steel manufacturers. Correspondingly, one fifth of the liabilities of the former group represented advances and payments by the United States Government while none of the latter group's liabilities revealed access to public funds.

It would appear, therefore, that the size of these ratios would depend greatly on the amount of cash that is needed in a particular situation to finance current operations. When a large portion of an industry's business is financed in one form or another by the United States Government the need to leave a large portion of the available resources idle in the form of cash seems to be considerably reduced.

Similarly, a company that can count among its main customers the Federal Government, the nation's banks, and substantial credit institutions may well be justified in considering a larger portion of their receivables as liquid assets than a company with large numbers of small firms as customers.

I am not aware that the ratio of cash and Government securities to current liabilities is being considered as a measure of a company's solvency by any Government agency. Historically, the ratio was included in the Quarterly Financial Reports as measure of shifts from a more liquid position to a less liquid position and viceversa by the entire business community regardless of the types of industry to which various businesses belonged. Economists may consider this ratio as an indicator of the liquid-[fol. 604] ity preference of industry in general, and may wish to study the increase and decrease of the amounts of money borrowed at various phases of the business cycle—to consider this ratio as a main criterion for a company's solvency appears to be a departure from traditional forms of analysis.

This discussion leads to the second reason why the selection of these particular ratios is of doubtful value in connection with the question whether HHM was in a failing condition: From a total of over forty ratios regularly published in the Quarterly Financial Reports, defendants have selected only the two ratios discussed here. To assess whether a particular company is on the brink of becoming insolvent many more factors than its liquidity need to be considered. Indeed, many analysts do not include the cash and government securities to current liabilities ratio among the numerous ratios they recommend as worthy of the credit appraiser's attention. A long list of textbooks on accounting consulted by me likewise failed to recommend the use, and sometimes even to mention the existence of this particular ratio.

There are attached to this affidavit 19 tables which relate to the question of HHM's solvency and the strength of its financial resources from many different aspects. The tables were prepared under my direction and follow the changes from year to year of a large number of ratios between various items shown on HHM's balance sheets and income statements.

HHM's performance as indicated by these tables was compared to that of its competitors Mosler and Diebold, companies with an industry background most specifically comparable to that of HHM. This form of statement was

chosen to avoid as far as possible the comparison of HHM's financial structure and operating performance with those of companies serving different markets and experiencing different credit requirements.

• • • • • • •

[fol. 605] 28. In addition to the foregoing analysis it should be noted that bonds, notes and mortgages payable (maturing for more than one year from date of balance sheet) decreased from $371,000 shown at the beginning of the fiscal year ended June 30, 1955 to $1,733.45 at the end of the fiscal year ended June 30, 1959. The company showed on their balance sheet as of June 30, 1959 buildings and other depreciable assets in the amount of $2,683,105.30. Depreciation was accumulated year after year and the net [fol. 606] value of buildings and other fiscal asets after depreciation shown as of June 30, 1959 was $696,443.26.

29. HHM was currently rated by Dun and Bradstreet Inc. This firm publishes every two months a large volume of financial ratings for a large number of corporations. The volume issued in March 1959 showed on page 3031 that Herring-Hall-Marvin Safe Company received "AA" rating for financial strength and a "1" "composite credit appraisal rating" (see Exhibits 18-20 attached hereto). The July and September issues of the same publication showed the corresponding ratings to be "AA" for financial strength and "A1" for composite credit appraisal.

The inside cover of this reference book contains a key to these ratings and explains that a financial strength rating of "AA" signifies financial strength of $1 million or more and a composite credit appraisal of "1" is considered "good" and of "A1" is considered "high".

30. Appendix Tables 20 through 27 show that for the years for which Census of Manufacturers figures are available (i.e. 1954 and 1958) HHM increased its sales more rapidly than did all American producers of fire-resistant safes, burglary-resistive safes, safe deposit boxes, and "all other" bank and security vault equipment taken as a group. To express the same effect in other words HHM increased from 1954 through 1958 its share of total shipments made by all producers. The industry total includes

all American producers whether they belong to the Safe and Vault industry or primarily manufacture other products.

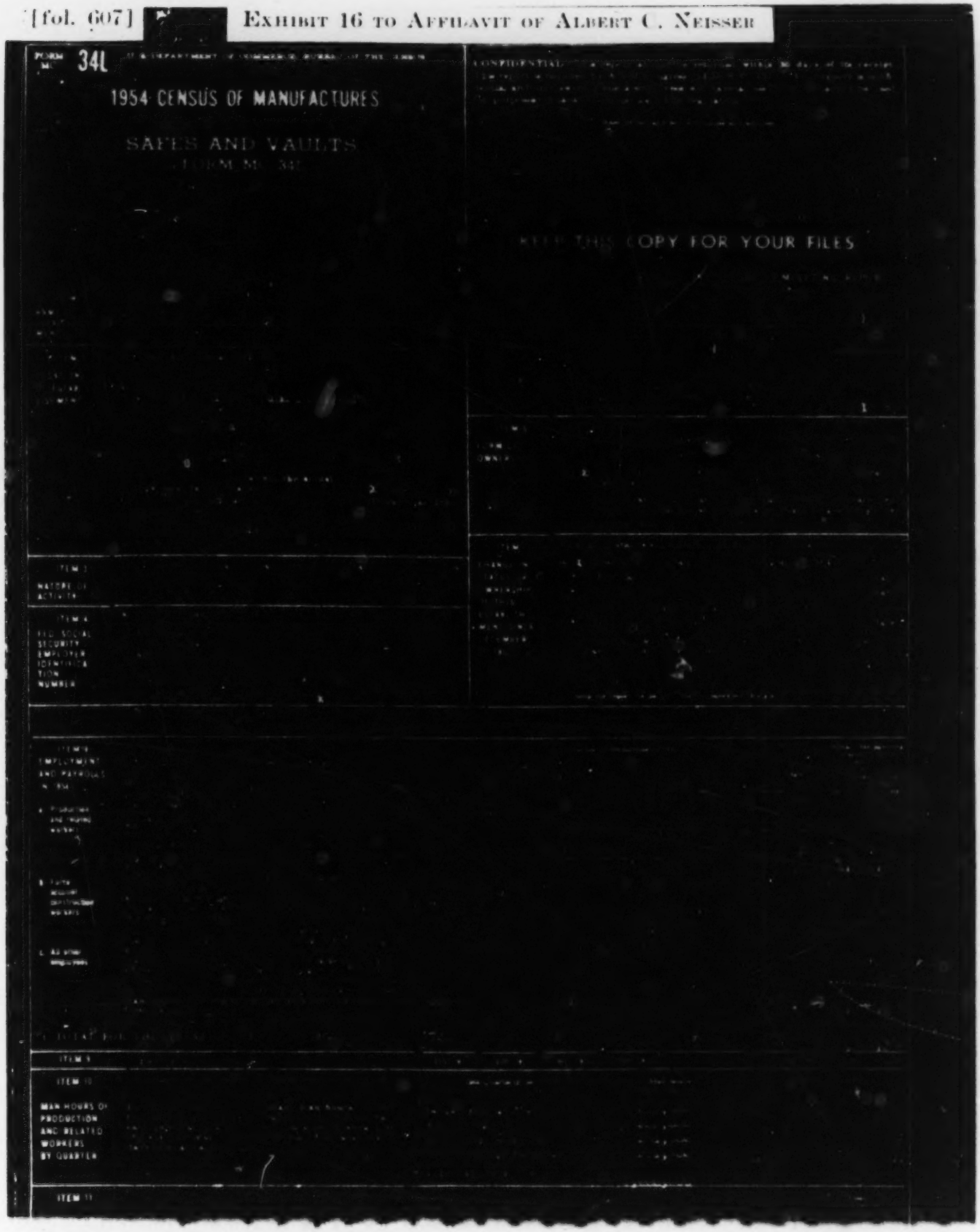
Albert C. Neisser.

Subscribed and sworn to before me this 27 day of Feb., 1961.

Sara B. McGraun.

My Commission Expires May 1, 1961.

[fol. 607] EXHIBIT 16 TO AFFIDAVIT OF ALBERT C. NEISSER



FORM M- 34L

1954 CENSUS OF MANUFACTURES

SAFES AND VAULTS

KEEP THIS COPY FOR YOUR FILES

COPY NOT

SUITABLE FOR

MICROCARDING

ITEM 10

SUMMARY OF MATERIALS, FUELS AND ELECTRIC ENERGY, CONTRACT WORK AND COST OF RESALE, DURING 1954

Cost of products bought and resold without further manufacture, processing, or assembly		$ 53,000
Parts consumed during 1954 (Should be the same as Item 12f, 1)		$ 22,000
Electric energy purchased during 1954 (Should be the same as Item 12f, 2)		$ 21,000
Cost of work done for you by others or your own materials during 1954 (contract work)		$ None
TOTAL (Sum of a, b, c, Check)		$ 96,000

ITEM 11

FUELS AND ELECTRIC ENERGY

Item	Code	Unit of measure	Quantity	Cost (omit cents)
	D1		D2	D3
Bituminous coal: Pennsylvania anthracite		Short ton	None	$ None
	20	Short ton	None	$ None
Distillate fuel oil (42 gals)		Bbls. (42 gals)	1,800	$ 15,800
Residual (heavy)		Bbls. (42 gals)	600	$ 5,600
Manufactured or mixed		M cu ft		$ None
Natural gas: Liquefied petroleum gas ☐ Wood ☐ Other	50			$ 22,000
TOTAL (Sum of lines 1 through 5 should be the same as Item 11f)				
			E1	E2
Electric energy purchased for resale		kw hr	4,000,000	$ 51,600
		kw hr	E3 None	E3 $
		kw hr	E4 None	$ None

ITEM 13

INDUSTRIAL WATER USE DURING 1954

a. Total gallons of water intake in this establishment during entire year 1954 (Check one): (1) ☒ 20 million gallons or more per year (2) ☐ 10 to 20 million gallons per year (3) ☐ 1 to 10 million gallons per year (4) ☐ Less than 1 million gallons per year

b. Kind of water used (Check one): (1) ☒ Fresh water (2) ☐ Brackish (salt) water from the ocean, ponds, or wells (3) ☐ Both

c. Check principal source of fresh water: (1) ☐ Public water systems (municipal, park or private rental) (2) ☐ Company surface water systems, such as streams or lakes (3) ☒ Company ground water systems, such as wells or deep springs

ITEM 14

HORSEPOWER RATING OF POWER EQUIPMENT AT END OF 1954

This figure should represent total horsepower rating of equipment in use or available for use at end of 1954. Report the horsepower rating indicated on name plates.

Kind of power equipment		Total horsepower rating (At end of year)
a. Internal combustion engines, steam engines and turbines, and other prime movers except for hydraulic type equipment	1. Driving generators	E5 hp
	2. Not driving generators	E7 hp
b. Electric motors (not horsepower and over)		E8 hp

ITEM 15

INVENTORIES OF THIS ESTABLISHMENT

Kind of inventory	Value of inventories: Beginning of 1954 (omit cents) (A)	Value of inventories: End of 1954 (omit cents) (B)
	F1	F3
a. Inventories of finished products	$ 160,000	$ 125,000
b. Inventories of work in process	$ 113,200	$ 111,000
c. Inventories of materials, supplies, fuel, etc.	$ 812,729	$ 565,000
d. TOTAL INVENTORIES (Sum of a, b, and c)	$ 1,085,929	$ 801,000

ITEM 16

CAPITAL EXPENDITURES FOR THIS ESTABLISHMENT DURING 1954

(Exclude expenditures by lessees)

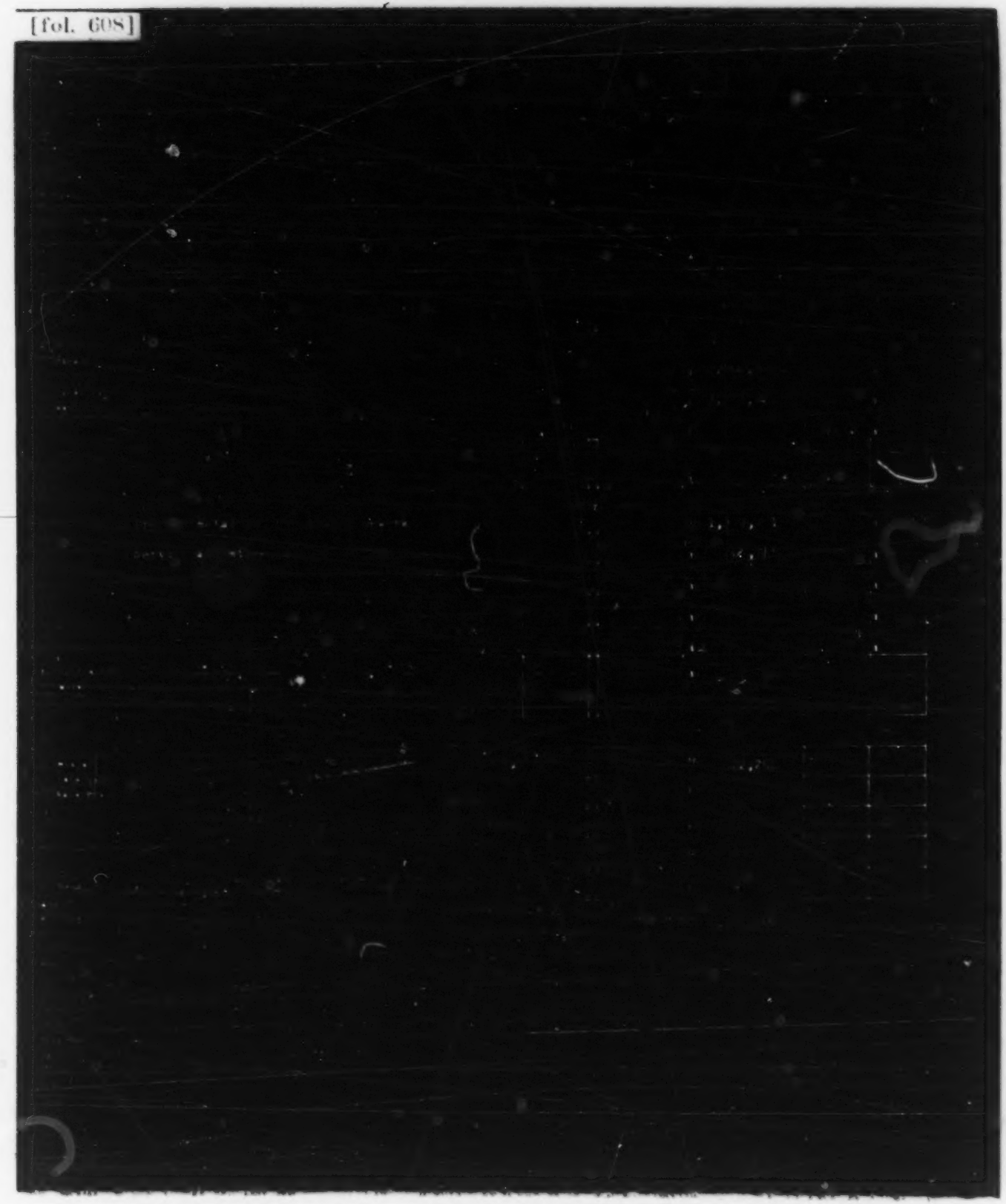
Expenditures refer to all costs actually incurred during 1954 which are chargeable to the fixed assets accounts of this establishment and which are of the type for which depreciation accounts are ordinarily maintained. Do not include cost of maintenance and repairs charged as current operating expense.

During 1954, did you make any expenditures for the establishment of the kind described above? (Check one) ☐ Yes ☐ No If "Yes," supply figures as follows:

Type of capital expenditure (omitting cents)	Expenditures (omit cents)	(Census Use Only)
	G1	
a. New structures and additions to plant (including major alterations, capitalized repairs and improvements)	$ 2,000	
b. New machinery and new equipment (including capitalized repairs and improvements)	$ 90,000	
c. Expenditures for used plant and used equipment acquired from others	$	
d. TOTAL CAPITAL EXPENDITURES (Sum of a, b, and c)	$ 116,729	

OVER

[fol. 608]



[fol. 609] 1954 Census of Manufacturers

Form MC 34 L

As Reported—	Line No.	Quantity D.	Value FOB Plant E.
Fire Resistive Safes (Insulated)	1		2,602,392
Burglar Resistive Safes and Chests	2		
Safe Deposit Boxes	3		3,073,025
Other Bank and Security Vaults and Equipment	4		
Pressed Metal and Hospital Casework	5		1,359,981
Service and Miscellaneous	6		206,748
Sales of Scrap and Refuse	11		22,254
			7,264,400
As Corrected—			
Fire Resistive Safes (Insulated)	1	23342	2,602,392
Burglar Resistive Safes and Chests	2	1304	312,960
Safe Deposit Boxes	3	63692	700,612
Other Bank and Security Vaults and Equipment	4		2,059,453
Pressed Metal and Hospital Casework	5		1,359,981
Service and Miscellaneous	6		206,748
Sales of Scrap and Refuse	11		22,254
			7,264,400

Form Approved. Budget Bureau No. 41-R1288.5

FORM DSA-100 (10-1-56)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

ANNUAL SURVEY OF MANUFACTURES
ESTABLISHMENT REPORT

CONFIDENTIAL - This report should be returned WITHIN 30 DAYS OF ITS RECEIPT. This report is authorized by Act of Congress (13 U.S.C. 181) which requires that you file a report. Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation, or regulation.

ITEM 1 FEDERAL SOCIAL SECURITY EMPLOYER IDENTIFICATION NUMBER (AS OF DECEMBER 31, 1958)

Enter identification number reported in Item 10 of Form 941, Employer's Quarterly Federal Tax Return. 31-0316885

(If this number was changed, or if a change of ownership has occurred, please enter the new number(s) and related ownership information in Item 12.)

ITEM 2 PHYSICAL LOCATION OF FACTORY, PLANT, OR SMALL SIZE OF RECORDED 31, 1958)

(Physical location may differ from mail address)
Street and number 1550 Grand Boulevard
City or town Hamilton
County Butler State Ohio
(If this location was changed, please enter the new location(s) in Item 12.)

(Please correct any errors in this mail address)
MA-100
HERRING HALL MARVIN SAFE CO
1
1900 GRAND BLVD 91 009
HAMILTON OHIO
0310926885 3492

00100A 0310316885

KEEP THIS COPY FOR YOUR FILES

READ DETAILED INSTRUCTIONS

IMPORTANT: Enter ALL figures, except Item 4 (Employment), in THOUSANDS

			1954	1955	1956	1957	1958
ITEM 3 SALARIES AND WAGES PAID TO— (Omit)	a. Production workers		1991	2180	2605	2829	2038
	b. All other employees		1450	1528	1315	1871	1803
	c. TOTAL PAYROLL (a + b)		3381	3658	3920	4700	4341
ITEM 4 NUMBER OF EMPLOYEES	Production Workers during pay period ended nearest 15th of —	a. March	499	497	605	680	522
		b. May	492	508	615	660	494
		c. August	533	471	516	651	486
		d. November	526	567	659	616	503
	e. SUM of lines a, b, c, and d		2050	2043	2395	2607	2005
	f. Average number (Divide sum on line e by 4)		512	511	598	652	501
	g. All other employees, March 15th		236	235	261	285	264
	h. TOTAL (f + g)		748	746	859	937	765
ITEM 5 PLANT MAN-HOURS OF PRODUCTION WORKERS, BY QUARTER (Thousands)	a. January through March		253	259	304	338	263
	b. April through June		244	260	318	330	249
	c. July through September		291	267	219	279	245
	d. October through December		272	287	331	291	252
	e. TOTAL PRODUCTION WORKER MAN-HOURS (Sum of a through d)		1060	1073	1262	1238	1009
ITEM 6 COST OF MATERIALS, FUELS, ELECTRIC ENERGY, CONTRACT WORK, ETC. (Omit)	a. Materials, parts, components, containers, supplies, etc., consumed		4001	4422	5074	3496	3182
	b. Products bought and resold without further manufacture		55	55	62	59	142
	c. Fuels consumed		82	84	95	98	93
	d. Purchased electric energy		57	49	57	55	50
	e. Cost of contract work done for you by others on your materials		0	0	0	0	0
	f.		2760	2760	3420		
ITEM 7 INVENTORIES OF THIS ESTABLISHMENT AT END OF YEAR (Omit)	a. Finished products inventories		126	186	191	289	
	b. Work-in-process inventories		441	643	818	775	
	c. Materials, supplies, fuels, etc., inventories		565	465	629	639	
	d. TOTAL INVENTORIES, END OF YEAR (a + b + c)		1132	1294	1639	1703	1591

	a. TOTAL PRODUCTION WORKER MAN-HOURS (Sum of a through d)	1000	1073	1127	1238	1009
ITEM 6 COST OF MATERIALS, FUELS, ELECTRIC ENERGY, CONTRACT WORK, ETC.	a. Materials, parts, components, containers, supplies, etc., consumed	2001	2422	2441	3496	3182
	b. Products bought and resold without further manufacture	85	55	62	59	142
	c. Fuels consumed	42	84	45	48	53
	d. Purchased electric energy	52	49	54	45	50
	e. Cost of contract work done for you by others on your materials	0	0	0	0	0
		2160	2560	3402	3652	3432
ITEM 7 INVENTORIES OF YOUR ESTABLISHMENT AT END OF YEAR ($000)	a. Finished products inventories	126	186	191	289	228
	b. Work-in-process inventories	441	643	368	775	439
	c. Materials, supplies, fuels, etc., inventories	165	465	1078	639	904
	d. TOTAL INVENTORIES, END OF YEAR (a + b + c)	1132	1294	1639	1703	1591
ITEM 8 CAPITAL EXPENDITURES DURING YEAR (Include land) ($000)	a. New structures and additions to plant	20	40	42	33	—
	b. New machinery and new equipment	96	119	69	96	10
	c. Used plant and used equipment acquired from others			4	50	63
	d. TOTAL EXPENDITURES (a + b + c)	116	159	115	129	73
ITEM 9 QUANTITY OF ELECTRIC ENERGY USED (Thous. of KWH)	a. Purchased electric energy (thousands of KWH)	4000	4010	4057	4442	4371
	b. Generated electric energy (gross less generating-station use)	0	0	0	0	0
	c. Electric energy sold or transferred to other plants	0	0	0	0	0

ITEM 10 VALUE OF PRODUCTS SHIPPED AND OTHER RECEIPTS ($000)	Products made in this establishment (Describe)	Product class code number (See list)	1954	1955	1956	1957	1958
	a. Gravure printing paper	34920	2602	2402	3107	3870	3798
	b. Rotogravure printed sales books	34909	313	384	488	1003	625
	c. Gift department forms	34920	700	1237	1385	1908	1931
	d. All other [illegible]	3499	2059	2302	3206	3325	3033
	e. Gravure printing [illegible]	[illegible]	1560	1693	—	—	—
	f. Printed Metal Closures	3412	690	692	750	780	762
	g. Hospital Containers	32220	408	256	218	44	46
	h. Tube Liners	34622	272	325	243	258	19
	i. Unassigned [illegible]	34920					50
	q. Value of shipments, if any, of additional products in Item 10, Supplement on reverse side						
r. Resales of products without further manufacture		8800X					17
s. Receipts for work done for others on their materials. Describe work:		9300X					
t. Miscellaneous receipts (Repair work, installation of own products, sales of scrap, etc.) Describe:		9000X	230	199	240	232	191
u. TOTAL (Sum of a through i and q through t)		7700X	7764	7997	10120	11420	10432

(Form MA 100 [illegible] (4-55)) (Please continue with item 11 on reverse)

[fol. 611]

ITEM 10 SUPPLEMENT	Additional products made in this establishment (Describe)	Product class code number (See list)	1954	1955	1956	1957	[illegible]
VALUE OF PRODUCTS SHIPPED ($000)							
	b						
	l						
(Extra space for entries in Item 10)	m						
	n						
	o						
	p						
	q. TOTAL VALUE OF SHIPMENTS OF ADDITIONAL PRODUCTS (Sum of l through p)						

REMARKS

For Answer to the above see letter of transmittal.

ITEM 13 (a) - INCREASE REFLECTS CONCENTRATION OF LABOR FORCE IN HIGHER SENIORITY HIGHER PAID WORKERS DUE TO LAY OFFS.

ITEM 11	Give name of controlling company of this establishment. If DIFFERENT from mailing name shown on front of report:

ITEM 12 STATUS OF OWNERSHIP OR OPERATION OF ESTABLISH-	Check box or enter date on only ONE line each year:	1953	1954	1955	1956
	a. Operated solely by your company during the year	X			

ITEM 11 — Give name of controlling company of this establishment, if DIFFERENT from mailing name shown on front of report:

ITEM 12 — STATUS OF OWNERSHIP OR OPERATION OF ESTABLISHMENT DURING 1958

a. Check box or write date as to only ONE box each year:	1955	1956	1957	1958
a. Operated solely by your company during the year	X			
b. * Purchased by you on _____ (Date)				
c. * Sold by you on _____ (Date)				
d. Did not operate at any time during the year (but still owned by you)				

* Give name and address of former owner (if Line b is dated) or purchaser (if Line c is dated)	Give new Employer Identification Number(s) (See Item 1 on front)	Give new location(s) of factory, plant, or mill (See Item 2 on front)

ITEM 13 — CHECK TO ASSURE A COMPLETE AND ACCURATE REPORT

The Census Bureau reviews your report for omissions, inconsistencies, and unusual ratios. To save you future correspondence about these problems, please make the following checks before returning your report:

(1) Review the report carefully to see that no items are omitted for the year being reported.
(2) Calculate the four "reasonableness" checks described below, entering the figures for each, and analyze your results.
(3) Correct your report for any errors you find; explain unusual figures in "Remarks" section.

"Reasonableness" checks	Calculations required for each check (1954)	Resulting figures for the year: 1955	1956	1957	1958
(a) Average hourly wages per worker	Item 3a (Production worker wages) ÷ Item 3e (Total man hours) 193	$ 1.77	$ 1.11	$ 2.23	$ 2.31
(b) Hours worked per year per worker	Item 3e (Total man hours) ÷ Item 4i (Average production workers) X 1,000 1954	2189	1980	1999	2014
(c) Salaries and wages per dollar of shipments	Item 3c (Total salaries and wages) ÷ Item 10e (Total value of shipments) .461	.469 ¢	.376 ¢	.411 ¢	.417 ¢
(d) Materials cost per dollar of shipments	Item 8f (Total materials cost) ÷ Item 10e (Total value of shipments) .368	.368 ¢	346 ¢	.32 ¢	.329 ¢

ITEM 14 — Name and address of person who should be contacted if questions arise regarding this report:

G. [illegible] Schlegel 1550 Grand Blvd. Hamilton, Ohio

Telephone No.: TW 4-1301

ITEM 15 — CERTIFICATION

This report is substantially accurate and covers the period from January 1955 to December 1958

March 30 1959 (Date) [illegible]

THIS IS A COPY OF PAGE 1a FOR YOUR FILES

Form approved; Budget Bureau No. 41-58101

MD-34Q

U. S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1958 CENSUS OF MANUFACTURES

3412

SAFES AND VAULTS

CONFIDENTIAL — This report is required by Act of Congress, approved August 31, 1954, (13 U.S.C. 131 and 224). Your report is confidential and only persons Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation.

0	CENSUS USE ONLY		Location		F/O
0-1		0-2			

PLEASE READ ENCLOSED INSTRUCTIONS BEFORE COMPLETING REPORT.

Please complete and return this form in the return envelope to the Bureau of the Census, Jeffersonville, Indiana, not later than 30 days after you receive it.

ITEM 1A NAME OF ESTABLISHMENT

NAME: HERRING-HALL-MARVIN Safe Company

(In answering Item 1B, parts (1) through (5) below, be sure your answers relate to the ACTUAL PHYSICAL LOCATION of your establishment, which may be different from its mailing address.)

ITEM 1B LOCATION OF ESTABLISHMENT

1. STATE: OHIO
2. COUNTY: Butler
3. Is this establishment within the legal boundary of a municipality? Yes [X] No [ ]

If "Yes,"
(a) Enter name of the municipality. (Enter name only if establishment is within legal boundary)
HAMILTON, OHIO

(b) Type of municipality. (Check applicable box)
[X] City [ ] Village [ ] Borough
[ ] Other (Specify) _____

4. STREET AND NUMBER OF ESTABLISHMENT LOCATION. If establishment cannot be described by street and number, give name and number of road or highway and any known information to locate establishment, e.g., R. 31, 3 miles South of Charlesville.)
1530 Grand Boulevard

5. Is this establishment within a town or township? Yes [ ] No [ ]
If "YES," ENTER NAME OF TOWN OR TOWNSHIP.

No establishments in this business have been reported in Delaware or Pennsylvania.

ITEM 2A FEDERAL SOCIAL SECURITY EMPLOYER IDENTIFICATION NUMBER

Federal Social Security Employer Identification Number of this establishment (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)
31-0816225
(Enter all 9 digits)

ITEM 2B COMPANY ORGANIZATION

(a) Does this company operate more than one place of business under the same Employer Identification Number (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)? Yes [ ] No [X]

(b) Does this company own or control another company? Yes [ ] No [X]

(c) Is this company owned or controlled by another company?
If "Yes" is checked in Part (c), give name and address of owning or controlling company. Yes [ ] No [X]

ITEM 2C FORM OF OWNERSHIP

(Check one)
(1) [ ] Individual proprietor
(2) [ ] Partnership (Specify number of working partners _____)
(3) [X] Corporation (Do not include any form of coop. assn.)
(4) [ ] Cooperative association (corporate or noncorporate)
(9) [ ] Other (Specify) _____

NOTE: If you remove the staple to complete Items 3, 4, 5, and the other inquiries on this form, please be sure to restaple the pages.

Establishment Identification Number _____
(This identification number appears in the lower right hand corner of the address box.)

[fol. 613] APPENDIX: SCHEDULE 1 TO AFFIDAVIT OF ALBERT C. NEISSER

Directory of Companies Filing Annual Reports With The Securities and Exchange Commission Under the Securities Exchange Act of 1934 Alphabetically And By Industry Groups

1959

Industry 341—Metal Cans

American Can Co.
Continental Can Company Inc.
National Can Corporation
U. S. Hoffman Machinery Corp.
4 Companies

Industry 342—Cutlery, Hand Tools & General Hardware

A. S. R. Products Corp.
Akron Brass Manufacturing Co. Inc.
American Forging & Socket Company
American Hardware Corporation
Crampton Manufacturing Co.
Eversharp Inc.
Gillette Company
Hurd Lock and Mfg. Co.
McKinney Mfg. Co.
Simonds Saw and Steel Company
Soss Manufacturing Company
Standard Products Company
L. S. Starrett Co.
Trans Continental Industries Inc.
14 Companies

Industry 343—Heating Apparatus—Except Electrical, and Plumbing Supplies

A. M. Radiator & Std. Sanitary Corp.
Briggs Mfg. Company
Coleman Company Inc.
[fol. 614] Holland Furnace Company
Iron Fireman Manufacturing Co.
McQuay Inc.

Mission Appliance Corp.
Murray Corp. of America
National Union Electric Corp.
National U. S. Radiator Corp.
Ruud Mfg. Company
Trane Company
Universal Rundle Corp.
13 Companies

Industry 345—Screw Machine Products and Bolts, Nuts, Screws, Rivets and Washers

American Screw Company
Brown McLaren Manufacturing Co.
Chicago Rivet & Machine Co.
Continental Screw Co.
Elastic Stop Nut Corporation of America
Heli-Coil Corp.
Lamson & Sessions Co.
Masco Screw Products Company
Monogram Precision Industries Inc.
Screw & Bolt Corp. of America
Serrick Corp.
Standard Pressed Steel Company
United Carr Fastener Corp.
Voi-Shan Industries Inc.
14 Companies

[fol. 615] Industry 349—Miscellaneous Fabricated Metal Products

Adams Engineering Co. Inc.
Air Control Products Inc.
American Art Metals Co.
American Chain and Cable Co. Inc.
American Metal Products Company
American Pipe and Construction Co.
W. R. Ames Co.
Apollo Industries Inc.
Arnold Altex Aluminum Co.
Associated Spring Corporation
Babcock & Wilcox Co.
Barry Controls Inc.

Belmont Iron Works
Black Sivalls & Bryson Inc.
Brooks & Perkins Inc.
Ceco Steel Products Corp.
Chamberlin Co. of America
Club Aluminum Products Inc.
Combustion Engineering Inc.
Crane Company
Crown Cork & Seal Company Inc.
Detroit Stamping Co.
Duriron Company Inc.
Edo Corporation
Ekco Products Company
Fenestra Inc.
Gate City Steel Inc.—Omaha
General Bronze Corporation
Hexcel Products Inc.
[fol. 616] Kawneer Company
Kromex Corporation
Lansing Stamping Co.
Lunkenheimer Co.
Macwhyte Company
Miami Window Corporation
Mirro Aluminum Company
Mt. Clemens Metal Products Co.
National Presto Industries Inc.
National Tank Co.
Parker Hannifin Corporation
Peninsular Metal Products Corp.
Randall Company
Reynolds Aluminum Supply Company
Rheem Manufacturing Co.
Robinson Technical Products Inc.
Rudy Manufacturing Co.
F. C. Russell Co.
Seaporcel Metals Inc.
Van Dorn Iron Works Company
Walworth Company
Wellington Electronics Inc.
Young Spring & Wire Corp.
Yuba Consolidated Industries Inc.
53 Companies

[fol. 617] APPENDIX: SCHEDULE 2 TO AFFIDAVIT OF ALBERT C. NEISSER

Directory of Companies Filing Annual Reports With The Securities and Exchange Commission Under the Securities Exchange Act of 1934 Alphabetically And By Industry Groups

1958

Industry 341—Metal Cans

American Can Co.
Continental Can Company Inc.
National Can Corporation
United Can & Glass Co.
U. S. Hoffman Machinery Corp.
5 Companies

Industry 342—Cutlery, Hand Tools & General Hardware

A. S. R. Products Corp.
Akron Brass Manufacturing Co. Inc.
American Forging & Socket Company
American Hardware Corporation
Crampton Manufacturing Co.
Eversharp Inc.
Gillette Company
Hurd Lock and Mfg. Co.
McKinney Mfg. Co.
Simonds Saw and Steel Company
Soss Manufacturing Company
Standard Products Company
L. S. Starrett Co.
13 Companies

[fol. 618] Industry 343—Heating Apparatus—Except Electrical, and Plumbing Supplies

AM Radiator & Std. Sanitary Corp.
Briggs Mfg. Company
Coleman Company Inc.
Holland Furnace Company
Iron Fireman Manufacturing Co.
Mission Appliance Corp.

Murray Corp. of America
National Union Electric Corp.
National U. S. Radiator Corp.
Ruud Mfg. Company
Trane Company
Universal Rundle Corp.
12 Companies

Industry 345—Screw Machine Products and Bolts, Nuts, Screws, Rivets and Washers

American Screw Company
Brown McLaren Manufacturing Co.
Buffalo Eclipse Corp.
Chicago Rivet & Machine Co.
Continental Screw Co.
Elastic Stop Nut Corporation of America
Lamson & Sessions Co.
Masco Screw Products Company
Pheoll Mfg. Co.
Pittsburgh Screw and Bolt Corp.
Serrick Corp.
Standard Pressed Steel Company
United Carr Fastener Corp.
13 Companies

[fol. 619] Industry 349—Miscellaneous Fabricated Metal Products

Adams Engineering Co., Inc.
Air Control Products Inc.
Alsco Inc.
American Chain and Cable Co., Inc.
American Metal Products Company
American Pipe and Construction Co.
W. R. Ames Co.
Apollo Industries Inc.
Arnold Altex Aluminum Co.
Associated Spring Corporation
Babcock & Wilcox Co.
Barry Controls Inc.
Belmont Iron Works
Black Sivalls & Bryson Inc.

Ceco Steel Products Corp.
Chamberlin Co. of America
Club Aluminum Products Inc.
Combustion Engineering Inc.
Crane Company
Crown Cork & Seal Company Inc.
Detroit Stamping Co.
Duriron Company Inc.
Edo Corporation
Ekco Products Company
Fenestra Inc.
Florida Steel Corp.
Gate City Steel Inc.—Omaha
General Bronze Corporation
Gibbs Automatic Moulding Corp.
[fol. 620] Kawneer Company
Kromex Corporation
Lansing Stamping Co.
Ludman Corp.
Lunkenheimer Co.
Macwhyte Company
Miami Window Corporation
Mirro Aluminum Company
Mt. Clemens Metal Products Co.
National Presto Industries Inc.
National Tank Co.
Parker Hannifin Corporation
Peninsular Metal Products Corp.
Randall Company
Reynolds Aluminum Supply Company
Rheem Manufacturing Co.
Robinson Aviation Inc.
Rudy Manufacturing Co.
F. C. Russell Co.
Seaporcel Metals Inc.
Union Wire Rope Corporation
United Metal Craft Company
Van Dorn Iron Works Company
Walworth Company
Young Spring & Wire Corp.
Yuba Consolidated Industries Inc.
55 Companies

[fol. 621] APPENDIX: TABLE 20 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Fire Resistant Safes by Herring-Hall-Marvin Safe Company (HHM) and by All Producers, With Index Numbers

(In Thousands of Dollars)

	Value of Shipments		Index Numbers: 1954 = 100.00	
	1954	1958	1954	1958
HHM	2,602	3,799	100 00	146 00
All Producers	10,245	10,235	100 00	99 90

Sources: *HHM*, photostatic copies of Form MA-100, and amended Form MC-34L., 1954 as submitted by HHM to the Bureau of the Census, U. S. Department of Commerce.

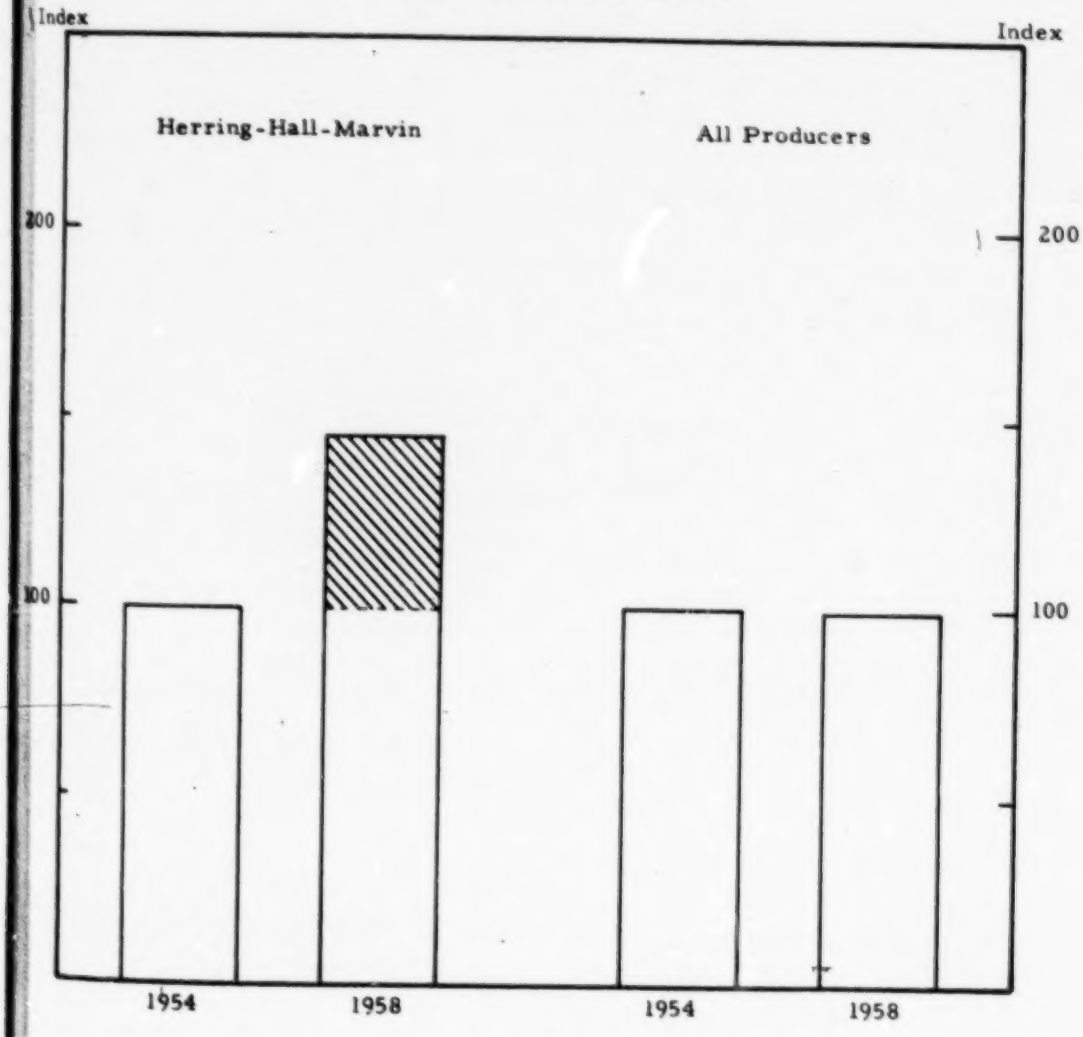
All Producers, U. S. Department of Commerce, Bureau of the Census: 1958 Census of Manufactures, Industry and Product Reports (Subject to Revision) March 1960, MC(P)—34F-3, Safes and Vaults Industry, (Industry Code 3492—S I C system in use through 1957) Table 3, Page 3.

APPENDIX: CHART I

INDEX OF DOLLAR VALUE OF SHIPMENTS
BY HERRING-HALL-MARVIN SAFE COMPANY AND
BY ALL PRODUCERS, 1954 - 1958

(Index Numbers, 1954 = 100)

A. FIRE-RESISTANT SAFES



Sources: HHM reports to the Bureau of the Census.
Bureau of the Census, 1958 Industry Reports MC(P)-34F-3.

[fol. 623] APPENDIX: TABLE 21 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Burglar Resistive Safes and Chests by Herring-Hall-Marvin Safe Company (HHM) and by All Producers, With Index Numbers

(In Thousands of Dollars)

	Value of Shipments		Index Numbers: 1954 = 100.00	
	1954	1958	1954	1958
HHM	313	625	100.00	199.68
All Producers	2,408	4,242	100.00	176.16

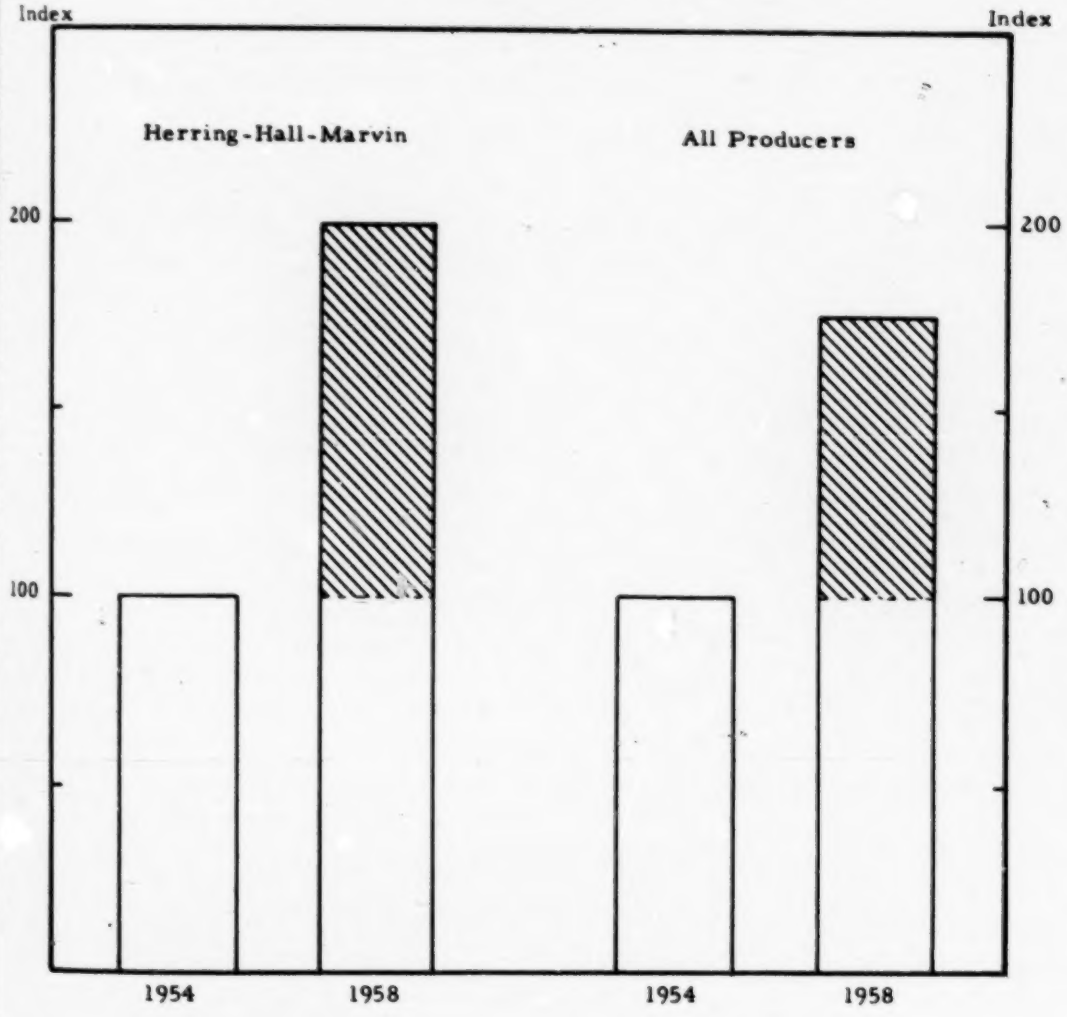
Sources: *HHM*, photostatic copies of Form MA-100, and amended Form MC-34L., 1954 as submitted by HHM to the Bureau of the Census, U. S. Department of Commerce.

All Producers, U. S. Department of Commerce, Bureau of the Census: 1958 Census of Manufactures, Industry and Product Reports (Subject to Revision) March 1960, MC(P)—34F-3, Safes and Vaults Industry, (Industry Code 3492—S I C system in use through 1957) Table 3, Page 3.

INDEX OF DOLLAR VALUE OF SHIPMENTS
BY HERRING-HALL-MARVIN SAFE COMPANY AND
BY ALL PRODUCERS, 1954 - 1958

(Index Numbers, 1954 = 100)

B. BURGLAR-RESISTIVE SAFES AND CHESTS



Sources: HHM reports to the Bureau of the Census.
Bureau of the Census, 1958 Industry Reports MC(P)-34F-3.

[fol. 625] APPENDIX: TABLE 22 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Safe Deposit Boxes by Herring-Hall-Marvin Safe Company (HHM) and by All Producers, With Index Numbers

(In Thousands of Dollars)

	Value of Shipments		Index Numbers: 1954 = 100.00	
	1954	1958	1954	1958
HHM	701	1,711	100 00	244 08
All Producers	6,887	9,013	100 00	130 87

Sources: *HHM*, photostatic copies of Form MA-100, and amended Form MC-34L., 1954 as submitted by HHM to the Bureau of the Census, U. S. Department of Commerce.

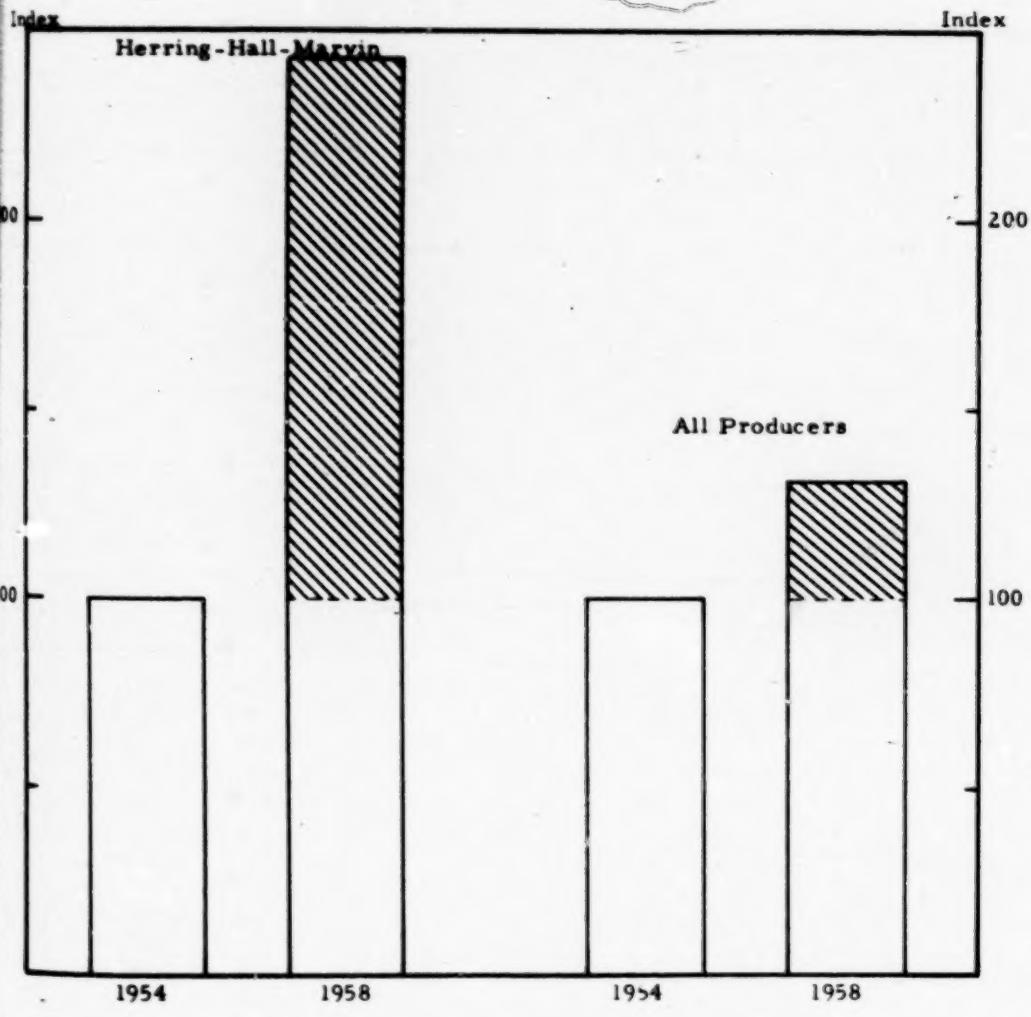
All Producers, U. S. Department of Commerce, Bureau of the Census: 1958 Census of Manufactures, Industry and Product Reports (Subject to Revision) March 1960, MC(P)—34F-3, Safes and Vaults Industry, (Industry Code 3492—S I C system in use through 1957) Table 3, Page 3.

APPENDIX: CHART 3

INDEX OF DOLLAR VALUE OF SHIPMENTS BY HERRING-HALL-MARVIN SAFE COMPANY AND BY ALL PRODUCERS, 1954 - 1958

(Index Numbers, 1954 = 100)

C. SAFE DEPOSIT BOXES



Sources: HHM reports to the Bureau of the Census.
Bureau of the Census, 1958 Industry Reports MC(P)-34F-3.

[fol. 627] APPENDIX: TABLE 23 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Bank and Security Vaults Equipment other than Fire Resistant Safes, Burgular Resistive Safes and Safe Deposit Boxes by Herring-Hall-Marvin Safe Company (HHM) and by all Producers, with Index Numbers

(In Thousands of Dollars)

	Value of Shipments		Index Numbers: 1954 = 100.00	
	1954	1958	1954	1958
HHM*	2,059	3,033	100.00	147.30
All Producers*	13,136	18,880	100.00	143.75

* In reporting to the United States Bureau of the Census, HHM used an abbreviated caption reading simply "All other bank and security vault equipment," while the complete description of this catch-all class of products used by the Bureau of the Census reads as follows: "all other bank and security vaults and equipment (including bank security lockers and night depositories, and interior equipment for safes and chests)."

Sources: *HHM*, photostatic copies of Form MA-100 and amended Form MC-34L, 1954 as submitted by HHM to the Bureau of the Census, United States Department of Commerce.

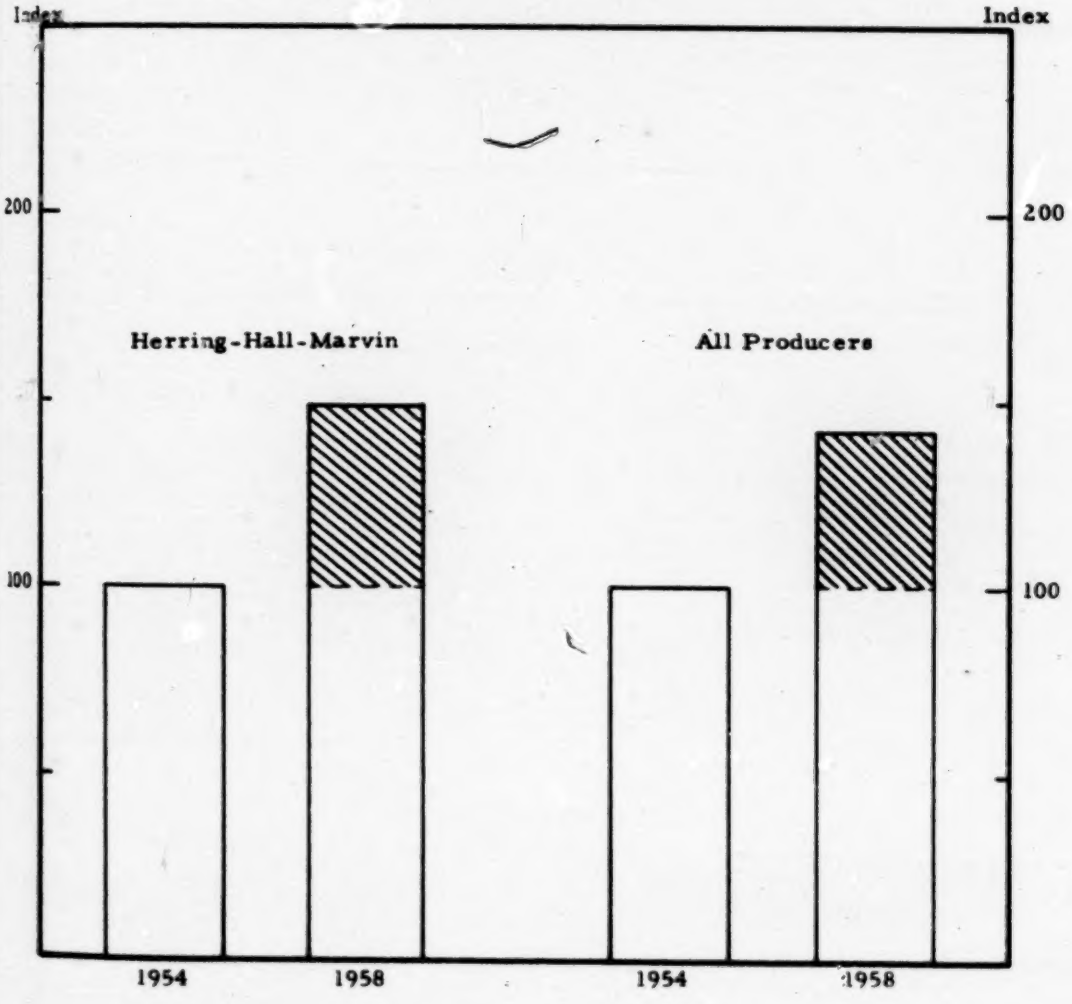
All Producers, United States Department of Commerce, Bureau of the Census: 1958 Census of Manufactures, Fabricated Metal Products, Not Elsewhere Classified, MC 58(2)-34E, Table 6A, Page 34E 22.

APPENDIX: CHART 4

INDEX OF DOLLAR VALUE OF SHIPMENTS BY HERRING-HALL-MARVIN SAFE COMPANY AND BY ALL PRODUCERS, 1954 - 1958

(Index Numbers, 1954 = 100)

D. ALL OTHER BANK AND SECURITY VAULTS AND EQUIPMENT



Sources: HHM reports to the Bureau of the Census.
Bureau of the Census, 1958 Census of Manufactures, Fabricated Metal Products, Not Elsewhere Classified, MC 58(2)-34E-22.

[fol. 629] APPENDIX: TABLE 24 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Fire-Resistive Safes by Herring-Hall-Marvin Safe Company (HHM) and by all Producers

(In Thousands of Dollars)

	1954	1958
HHM	$ 2,602	$ 3,799
All Producers	10,245	10,235
HHM's Share of Total Shipments	25.40%	37.12%

Sources: *HHM*, photostatic copies of Form MA-100, and amended Form MC-34L; 1954 as submitted by HHM to the Bureau of the Census, United States Department of Commerce.

All Producers, United States Department of Commerce, Bureau of the Census, 1958 Census of Manufactures, Industry and Product Reports (Subject to Revision) March 1960, MC(P)—34F-3, Safes and Vaults Industry. (Industry Code 3492—S.I.C. system in use through 1957) Table 3, Page 3.

[fol. 630] APPENDIX: TABLE 25 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Burgler-Resistive Safes and Chests by Herring-Hall-Marvin Safe Company (HHM) and by all Producers

(In Thousands of Dollars)

	1954	1958
HHM	$ 313	$ 625
All Producers	2,408	4,242
HHM's Share of Total Shipments	13.00%	14.75%

Sources: *HHM*, photostatic copies of Form MA-100, and amended Form MC-346, 1954 as submitted by HHM to the Bureau of the Census, United States Department of Commerce.

All Producers, United States Department of Commerce, Bureau of the Census; 1958 Census of Manufactures, Industry and Product Reports (Subject to Revision), March 1960, MC(P)—34F-3, Safes and Vaults Industry, (Industry Code 3492—S.I.C. system in use through 1957) Table 3, Page 3.

[fol. 631] APPENDIX: TABLE 26 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Safe Deposit Boxes by Herring-Hall-Marvin Safe Company (HHM) and by all Producers

(In Thousands of Dollars)

	1954	1958
HHM	$ 701	$ 1,711
All Producers	6,887	9,013
HHM's Share of Total Shipments	10.18%	18.98%

Sources: *HHM*, photostatic copies of Form MA-100, and amended Form MC-34L, 1954, as submitted by HHM to the Bureau of the Census, United States Department of Commerce.

All Producers, United States Department of Commerce, Bureau of the Census; 1958 Census of Manufactures, Industry and Product Reports (Subject to Revision) March 1960, MC(P)—34F-3, Safes and Vaults Industry (Industry Code 3492—S.I.C. system in use through 1957) Table 3, Page 3.

[fol. 632] APPENDIX: TABLE 27 TO AFFIDAVIT OF ALBERT C. NEISSER

Shipments of Bank and Security Vaults Equipment other than Fire-Resistive Safes, Burglar-Resistive Safes and Safe Deposit Boxes by Herring-Hall-Marvin Safe Company (HHM) and by all Producers

(In Thousands of Dollars)

	1954	1958
HHM*	$ 2,059	$ 3,033
All Producers*	13,136	18,880
HHM's Share of Total Shipments	15.67%	16.06%

* In reporting to the United States Bureau of the Census, HHM used an abbreviated caption reading simply "All other Bank and Security Vault Equipment," while the complete description of this catch-all class of products used by the Bureau of the Census reads as follows: "All other Bank and Security Vaults and Equipment (including bank security lockers and night depositories, and interior equipment for safes and chests)."

Sources: *HHM*, photostatic copies of Form MA-100, and amended form MC-34L, 1954, as submitted by HHM to the Bureau of the Census, United States Department of Commerce.

All Producers, United States Department of Commerce, Bureau of the Census: 1958 Census of Manufactures, Fabricated Metal Products, Not Elsewhere Classified, MC58(2)-34E, Table 6a, Page 34E-22.

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CITATIONS

Cases.

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Erie Sand and Gravel Co. v. *Federal Trade Commission*, C.A. 3, decided May 29, 1961, 1961 Trade Cases, ¶ 70,028	18, 19, 21
Farm Journal, Inc., 53 F.T.C. 26	21
International Shoe Co. v. *Federal Trade Commission*, 280 U.S. 291	3, 6, 15, 16, 17, 18, 19
Maryland and Virginia Milk Producers Assn. v. *United States*, 362 U.S. 458	2

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, APPELLANT,

v.

DIEBOLD, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court granted appellant's motion for summary judgment without written opinion. The court's ruling from the bench granting the motion (Transcript, March 8, 1961, p. 32)[1] is set forth in the Statement *infra*, p. 14. The court's findings of fact and conclusions of law are reprinted in the Appendix, *infra*, pp. 22-23.

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[1] Although the record below, as certificated to this Court, is not paginated, each document has been numbered for the convenience of the Court in the chronological order in which it appears in the docket.

JURISDICTION

The United States brought this action against Diebold, Incorporated and Herring-Hall-Marvin Safe Company under Section 15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain violation of Section 7 of the Clayton Act. On March 8, 1961, the district court entered a judgment (Appendix, *infra*, p. 34) granting Diebold's motion for summary judgment. On May 5, 1961, the United States filed notice of appeal. By order of June 20, 1961, the district court extended the time for docketing the case and filing the record from July 5, 1961 to and including August 4, 1961. On June 23, 1961 the district court, on motion of the United States, entered an order dismissing the complaint against Herring-Hall-Marvin Safe Company. On July 3, 1961 the United States filed a second notice of appeal to guard against a possible claim that the May 5, 1961 notice of appeal was premature inasmuch as the action was still pending at that time against Herring-Hall-Marvin.[2]

The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Yellow Cab Co.*, 332 U.S. 218; *United States* v. *Radio Corporation of America*, 358 U.S. 334; *Maryland and Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458.

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[2] See 6 Moore's *Federal Practice* (2d ed.) Par. 54.34[2]).

STATUTE INVOLVED

The first paragraph of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, reads as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

QUESTION PRESENTED

Diebold, one of three large firms engaged in the manufacture of bank vault equipment and related products, agreed to acquire the assets of one of the other two companies. The United States filed suit under the Clayton Act to enjoin the acquisition. Holding in advance of a trial of the issues of fact that this Court's decision in *International Shoe* v. *Federal Trade Commission*, 280 U.S. 291, constituted a defense, the district court granted Diebold's motion for summary judgment on the ground that the acquisition did not threaten competition because the acquired corporation was hopelessly insolvent and there was no possibility of its accomplishing a reasonable sale to another purchaser. The following question is presented:

Whether the district court misconceived this Court's decision in *International Shoe* and its own role as trier

of the facts when it dismissed the complaint, without trial, upon the basis of findings which gave an incomplete picture of the acquired company's financial status and ability to continue as an active competitor and which, among other things, ignored undisputed facts of record showing (a) that the acquired company had, during the five years preceding the sale, steadily improved its basic financial condition, (b) that it had consistently operated at a profit, maintained favorable credit standing, and enjoyed an increasing share of the market, and (c) that there were other non-competitive groups which had expressed an active interest in purchasing the company.

STATEMENT

This is a case arising under Section 7 of the Clayton Act in which, on motion for summary judgment, it was held that the acquired company was a "failing company" and that the acquisition of its assets by a competitor was therefore beyond reach of the statute.

On August 24, 1959, the United States filed a civil complaint, naming as defendants Diebold, Incorporated (Diebold) and Herring-Hall-Marvin Safe Company (HHM). It alleged that Diebold and HHM were two of the only three firms engaged in the manufacture and sale of certain bank vault equipment, that the two companies had entered into an agreement for the sale to Diebold of HHM's assets and that the effect of carrying out the agreement may be to substantially lessen competition or tend to create a monopoly in the manufacture and sale of bank vault equipment and re-

lated products, in violation of Section 7 of the Clayton Act.

The government simultaneously filed a motion for a preliminary injunction to prevent consummation of the acquisition pending determination of the merits of the complaint. In opposition, Diebold filed the affidavit of Raymond Koontz, its president. The affidavit made no reference to the financial condition of HHM. Rather, it suggested that the president of HHM had precipitated this suit as a means of avoiding HHM's obligations under the contract of sale. (Koontz Affidavit, filed September 1, 1959, pars. 1-26).[3]

The district judge denied the government's motion for a preliminary injunction and on September 11, 1959, the transaction was consummated. On September 17, 1959, Diebold filed its answer, which denied the allegations of the complaint but made no reference to the financial condition of HHM.

Diebold's first reference to HHM's financial condition was not made until many months later. On November 18, 1960, the government filed a motion for an order to require Diebold to give 60 days' notice of any contemplated changes affecting the principal assets acquired from HHM. In attempted justification of its action in closing down HHM's sales offices and transferring HHM personnel to its own offices, Diebold

[3] The contract provided that it would be terminated if an injunction is in effect for 120 days unless extended by consent (see Diebold's Memorandum in Opposition to the Motion for Preliminary Injunction, pp. 1-2).

for the first time pointed to the alleged financial difficulties of HHM. During the hearing on the motion,[4] the court repeatedly indicated that the suit should be disposed of summarily and without trial (Transcript, November 18, 1960, pp. 20-23, 25), stating that "the Government should have come in and agreed to a consent entry of some kind" (*id.* at 20) and that "when the Administrative Office is on our back wanting to know why this case is pending so long * * * it seems to me that there is a lot of affairs going on in the United States regarding mergers that are a lot more important than this is * * * " (*id.* at 23).

Diebold's Motion for Summary Judgment

In accordance with the court's suggestion, Diebold moved for summary judgment. Citing *International Shoe* v. *Federal Trade Commission,* 280 U.S. 291, it argued that Section 7 was inapplicable to a "failing company" and that the undisputed facts showed "HHM was obviously a firm *in extremis*" on the settlement date (September 11, 1959) and "could not possibly have long survived." (Diebold Memorandum in Support of Motion for Summary Judgment, p. 15.) Diebold sought to show that on the settlement date and for several months prior thereto HHM did not have the cash to pay its debts as they became due; that HHM's plant was incapable of competing in a highly competitive market; and that, following the

[4] The district court regarded the government's motion for 60 days' notice as another request "for a temporary injunction" (Transcript, November 18, 1960, pp. 28-29) and failed to act on it.

acquisition, orders from the HHM division of Diebold declined (*id.* at 13-15).[5]

Diebold submitted data relating to the financial picture of HHM to show the following:

1. HHM's net sales were $10,672,000 in 1956-57 and fell approximately $300,000 in each of the two fiscal years preceding the acquisition.

2. From 1950 to 1959, HHM had been short of working capital (current assets minus current liabilities) and from 1951 to 1959 its working capital ratio (relationship between current assets and current liabilities) averaged only 1.5.

3. From 1950 to 1958, its total liabilities exceeded its tangible net worth.

4. It was short of cash and frequently "overdrawn" on its bank accounts between April 1959 and September 1959.

5. Between July 1, 1959 and September 11, 1959 (the settlement date), it sustained operating losses exceeding $206,000.

6. In September, 1959, soon after the closing, Diebold advanced $500,000 in cash to meet past and currently due trade obligations of HHM.

7. In the spring of 1959, the HHM union presented HHM with "excessive demands" to which HHM had to yield, and because of this the president of HHM gave serious consideration to recommending to the Board of Directors that HHM be liquidated.

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[5] Diebold's principal supporting papers were the affidavits of its president, its vice-president, the president of HHM, special audit reports of a certified public accountant, and the report of a firm of consulting engineers.

8. In the opinion of certain consulting engineers, HHM was a high-cost producer which could exist only as a marginal operation and which could probably not survive in a highly competitive market.

9. Following the acquisition, orders placed with the HHM Division of Diebold declined; this resulted in employee lay-offs and 294 of the 664 employees were dropped from the payroll within less than a year and a half after the acquisition.

The Government's Theory in Opposition

In opposition, the government sought to show that HHM was not facing imminent financial collapse; that its basic economic condition was sound; that the long-term financial picture of the company was one of almost uninterrupted improvement; that the company's financial condition and operating performance, compared to the other major firms in the industry, were good; and that, in light of the company's increasing share of the market, future prospects were favorable. The government sought to show further that HHM enjoyed favorable credit standing, that Diebold paid a premium price for HHM's assets, that the conduct of the parties during the negotiations is inconsistent with the theory that HHM was on the brink of disaster, and that, although Diebold may have been the only purchaser willing to pay the price at which the sale was made, there were other prospective purchasers interested in acquiring HHM.

A. *HHM's long-term financial picture.* Data based on HHM's published financial statements and on the

special audit reports filed in support of Diebold's motion show the following:

1. In the fifteen years preceding the acquisition, HHM's net sales rose from $1,157,967 in 1944 to $5,023,270 in 1949, to $6,898,633 in 1954 and to $10,672,279 in 1957. Although sales fell off by approximately $300,000 in each of the two succeeding years, net sales in each of these years still exceeded $10,000,000 (Singman Affidavit, Ex. 7, filed March 1, 1961).

2. The company's working capital progressively improved from a minus position of $167,305 in 1944 to a favorable balance of $217,538 in 1949, $547,143 in 1954 and $1,317,755 in 1959 (*id.*, Ex. 9). Although its working capital ratio averaged 1.5 from 1951 to 1959, the ratio showed almost uninterrupted improvement from 1944 to 1959, the last three years showing unbroken growth (*ibid.*).

3. Its retained earnings account increased from a deficit position of $385,144 in 1944 to a favorable position of $787,617 in 1949, to $1,254,616 in 1954, to $2,247,987 in 1959 (*id.*, Ex. 8).

4. During fiscal 1959 HHM reduced its liability on notes and loans payable from over $700,000 to under $300,000; it was free of long-term debt as of June 30, 1959; and the mortgage on its land, building and equipment which amounted to almost $325,000 as of June 30, 1955, was paid off by June 30, 1958 (*id.*, par. A6).

5. In each of the fiscal years 1955 through 1959, its net income after taxes ranged from $116,924.41 (1955) to $256,415.61 (1956); in 1957, 1958 and 1959, it was respectively $181,710.81, $185,776.52 and $187,602.73 (*id.*,

par. A. 1, Exs. 1-6, Table 1). The average return on investment for this period was in excess of 11% after taxes. For the fiscal year 1959, it was 19.6% before taxes and 8.98% after taxes (*id.*, par. A. 1, Table 1).

6. The company paid dividends of $2.00 a share for each of the five fiscal years 1955 through 1959 (*id.*, par. A. 3, Exs. 1-6, Table 3).

7. Although HHM's total liabilities exceeded its tangible net worth from 1950 through 1958, the gap between the two consistently narrowed until in 1958 tangible net worth was about equal to total liabilities (noncurrent as well as current). In 1959, tangible net worth was $2,313,441 compared with total liabilities of $1,930,742 (Lybrand, Ross Report #2, Summary of Statements of Liabilities and Shareholders' Equity 1944 through 1959, filed in support of motion for summary judgment).

B. *Comparison of HHM's Financial Strength and Operating Performance with those of Diebold and Mosler Safe Company.* Based on an examination of the federal income tax returns of the three major companies in the field (HHM, Diebold and the Mosler Safe Company) for the five-year period preceding the merger, a government economist compared their financial strength and operating performance. Applying criteria customarily used by accountants and economists (such as the relationship between net income and net sales, net income and net worth, net sales and working capital, net sales and inventory, etc.), he concluded that HHM, compared to the other two companies, was in sound financial condition and made

effective use of its financial resources (Sealed Neisser Affidavit).[6]

C. *HHM's Increasing Share of the Market.* A comparison of reports filed with the Census Bureau showed, with respect to key products, that from 1954 to 1958 (the years for which reports were available) HHM's rate of increase in sales was greater than that for the industry as a whole and that HHM increased its share of the market (Sealed Neisser Affidavit).

D. *HHM's Credit Standing.* Dun and Bradstreet, Inc., in July and September 1959, rated HHM "AA" for financial strength and gave it a composite credit appraisal of "A 1" (Sealed Neisser Affidavit). HHM's principal bank depositary extended loans to HHM without requiring security or collateral and charged interest of only one-half to one per cent above the prime rate (Fitton Deposition, filed March 1, 1961, pp. 105-106, 110).

E. *The Price Paid.* In exchange for the assets of HHM (which were shown by HHM's balance sheet to total approximately $4,000,000), Diebold paid $3,000,000 in cash and agreed to pay HHM's liabilities which were shown to amount to approximately $1,800,-

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[6] "Sealed Neisser Affidavit" will refer to the affidavit which was filed March 1, 1961, and all attachments thereto. By order filed March 28, 1961, the district court, on motion of the Mosler Safe Company, ordered the sealing of the affidavit and supporting papers, as well as the Government's Memorandum in Opposition to the Motion for Summary Judgment, the first paragraph of that order reciting that portions of these papers "disclose trade secret information" about the Mosler Safe Company. (See also Transcript, January 9, 1961, pp. 5-20; Transcript, March 8, 1961, pp. 3-10, 37-38).

000.[7] In addition, Diebold agreed to employ Mosman, HHM's president, for nine years, at $50,000 a year for the first five years and $25,000 a year for the remaining four.[8]

F. *The Statements and Conduct of the Parties as they Bear on the Theory that the Sale was Made to Avoid Financial Disaster.* Long before the "failing company" defense was asserted, officials of HHM and Diebold filed affidavits describing their conduct with respect to the sale. The government sought to show that this conduct was inconsistent with the theory that HHM was forced to sell in order to avoid imminent financial collapse.

Mosman, the president of HHM, had for some time considered selling the business of HHM; from time to time, he had been approached by a number of prospective purchasers, including Diebold. He wanted to sell "because of the problems that might arise in the event of his death." (Mosman Affidavit, par. 3, filed September 1, 1959). He wished to provide funds for his estate taxes and he was concerned because he had no top management personnel to carry on the business, which he had dominated (Koontz Affidavit, par. 3, filed September 1, 1959). In May 1957, Mosman and the president of Diebold reached an oral agreement

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[7] The balance sheet figures are approximately the same in the April 30, 1959, balance sheet (attached as Ex. A to the Robinson Affidavit, filed with the Motion for Summary Judgment) and the September 11, 1959 balance sheet (reproduced in par. 5 of one of the two Robinson affidavits dated February 27, 1961, and filed March 8, 1961).

[8] The agreements relating to the sale are attached to the Toohey Affidavit, filed March 1, 1961.

for a sale on the following terms: $1,000,000 for net current assets, $750,000 for machinery and equipment, and a 20-year lease of the buildings at $100,000 a year. Mosman, however, refused to go through with the agreement, insisting on a higher price (*id.*, par. 4).

In May 1959, negotiations were reopened but, before Diebold committed itself to the purchase, Mosman informed Diebold that there were inaccuracies in the HHM balance sheet relied on by the parties in connection with the sale. He disclosed that he had reclassified $100,000 of "receivables" as "cash." Diebold nevertheless went ahead with the transaction (Robinson Affidavit, par. 2, filed with Motion for Summary Judgment). During the period when HHM was allegedly "*in extremis*", Mosman repeatedly sought to get out of the contract, but Diebold resisted these efforts, going so far as to make contract revisions advantageous to HHM and Mosman personally (Koontz Affidavit, pars. 4-26).

G. *Other Prospective Purchasers.* There were at least three non-competing prospective purchasers who were interested in acquiring the business of HHM (Van Ness Affidavit, filed February 13, 1961; Boyce Affidavit, filed March 1, 1961; Nolte Affidavit, filed March 1, 1961; Mosman Affidavit in Response to Interrogatories, filed January 20, 1961). Negotiations with one of these continued until the sale to Diebold and proceeded to the point where the prospective purchaser had inspected HHM's plant, submitted detailed financial figures, named Hayden Stone & Co., a large investment banking firm, to form a purchasing group, and made plans

for a public offering of a portion of the stock representing the properties to be purchased (Boyce Affidavit and attachments thereto, filed March 1, 1961).

The District Court's Decision on the Motion

Ruling from the bench, the district court granted Diebold's motion. It held (Transcript, March 8, 1961, p. 32):

> The motion for summary judgment will be allowed within the principles enunciated by the International Shoe case * * *, and of course, you understand from that this case turns strictly on the principle there that this was a failing company, and we do not go into the merits of the competitive feature.

Overruling the government's objections, the court adopted the Findings of Fact and Conclusions of Law proposed by Diebold (*id.*, 31, 34). With respect to HHM's financial status, the court accepted the data concerning HHM's financial condition which Diebold had submitted in its supporting papers, and on the basis of this data concluded that "At the time of its acquisition by Diebold on September 11, 1959, and for at least 9 months prior thereto, HHM was hopelessly insolvent and faced with imminent receivership." (Fdg. 28.) The findings make no reference to the information and data submitted by the government and summarized above.

With respect to the three other prospective purchasers, characterized in the findings as "promoters", the court found that none had made a "firm" offer

and concluded that "Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities" (Fdg. 26; Concl. of Law 4).

THE QUESTION IS SUBSTANTIAL

This appeal raises important issues as to the meaning and scope of the "failing company" defense in an anti-merger suit under Section 7 of the Clayton Act—a defense which has always been regarded as a narrow and specialized exception to the express prohibitions of the Act. Except for this defense Diebold's acquisition of HHM's assets was plainly a violation of the anti-trust laws. The district court allowed the defense on the basis of the acquired company's temporary difficulties and an incomplete picture of its financial condition, although it appeared (a) that the company's long-term financial position and operating performance showed almost uninterrupted improvement and (b) that there were prospective purchasers not in competition with the acquired firm who had indicated a bona fide interest in making the purchase. This ruling has considerably expanded the boundaries of the "failing company" doctrine drawn by this Court in *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291, and, if followed, will impair the effectiveness of Section 7 in limiting future increases in the level of economic concentration resulting from corporate mergers. Closely intertwined with the question whether the district court misconstrued and misapplied *International Shoe* is the further question whether the underlying issues could properly be determined on motion for summary judgment.

1. In *International Shoe*, this Court enunciated the so-called "failing company" doctrine. Reversing a Federal Trade Commission decision that a stock acquisition violated Section 7 of the Clayton Act, the Court upheld the position "that there never was substantial competition between the two corporations * * *." 280 U.S. at 294. As an additional ground for decision, the Court accepted the alternative contention that in any event "the financial condition of the * * * [acquired company] was such as to necessitate liquidation or sale, and, therefore, the prospect for future competition or restraint was entirely eliminated." *Ibid.*

The Court's acceptance of this alternative contention rested on its evaluation of the total picture of the acquired company's financial condition and performance, considered both by itself and in comparison with that of the acquiring corporation (which the Court, for purposes of this branch of the case, assumed to be a competitor), the availability of other purchasers and the existence of other alternatives to sale or liquidation. It relied upon these facts: The acquired firm lost over $6 million in the year prior to the acquisition; within a year it exhausted a surplus of $4 million and piled up a deficit of close to $4½ million; it owed $15 million to banks and $2 million on current account; new orders were not coming in and it was producing at only 15% to 18% of capacity; it passed dividends on two classes of stock and was about to do so on the third. The condition and operating performance of the acquiring firm, on the other hand, were excellent during this same period. The acquiring

firm was the only available purchaser and sale to it was believed to be the only alternative to complete collapse.

Such, then, was the situation—one described as that of "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated * * * (there being no other prospective purchaser) * * *" (280 U.S. at 302-303)—in which the Court upheld the contention that "the prospect for future competition or restraint was entirely eliminated." 280 U.S. at 294.

In the instant case, however, the district court based its conclusion on an incomplete and inaccurate [9] picture of HHM's condition; it failed to take into account the company's total financial picture, which showed that the company, while often short of cash and not punctual in paying its trade bills,[10] was far from being "in such

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[9] For example, the court's Fdg. 6 states that "HHM's balance sheets from June 1950 down through 1958 continuously reflected liabilities well in excess of tangible net worth * * *." This, however, overlooks (a) the consistently narrowing gap between the two (until in 1958 they were about equal) and (b) that in 1959 tangible net worth was more than $380,000 in excess of all liabilities (*supra*, p. 10). Also, Fdg. 4 states that between 1950 and 1959 "HHM had been short of working capital," and Fdg. 6 finds that its working capital ratio "averaged only approximately 1.5 * * *." These findings, however, fail to note the continually bettering position in both these figures (*supra*, p. 9).

[10] The repeated suggestion in the findings (Fdgs. 9-12) that HHM was frequently "overdrawn" on its bank accounts may be misleading. HHM always had sufficient funds in its account to cover checks *actually* presented for payment (Ziegler Deposition, filed March 1, 1961, pp. 10-16), although at various times during the several months preceding the closing HHM was "overdrawn" in the sense that, if a balance were struck at those particular times,

straits that the termination of the enterprise and the dispersal of its assets seems inevitable * * *." *Erie Sand and Gravel Co.* v. *Federal Trade Commission*, May 29, 1961 (C.A. 3), 1961 Trade Cases, Par. 70,028, at p. 78,095.

Indeed, the company showed a history of almost uninterrupted growth. Its net sales rose from slightly more than $1 million in 1944 to over $5 million in 1949 and to $10.7 million in 1957. Although sales declined by about $300,000 in each of the two succeeding recession years, net sales in 1959, the year of the acquisition, still exceeded $10 million. The company's working capital was a minus figure in 1944, but in 1949 it was over $200,000 and in 1959 more than $1,300,000, a six-fold increase in 10 years. In each of the five years preceding the acquisition, the company made money and paid dividends, at the same time increasing its retained earnings account from $1¼ million to $2¼ million. In the year preceding the acquisition, the company paid off more than half of its notes and loans payable, and on June 30, 1959 it was free of long-term debt. Not only was Diebold willing to pay $3 million in cash and assume all liabilities in order to make the acquisition; it strenuously resisted HHM's repeated efforts to escape from the contract of sale, going so far as to make revisions which further liberalized the benefits for HHM and its president.

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the amount standing to HHM's credit in the account would have been smaller than the amount represented by all checks drawn on the account but not actually presented for payment. (Lybrand, Ross Report #1, filed with the Motion for Summary Judgment, first paragraph of p. 2 of letter dated December 8, 1960, accompanying the Report and Sched. C).

In *International Shoe,* the Court dismissed as "wholly within the realm of speculation" the suggestion that "instead of an outright sale, any one of several alternatives might have been adopted which would have * * * preserved competition * * *." 280 U.S. at 301. It observed that the officers of the acquired company, "after long and careful consideration of the situation, concluded that the company was faced with financial ruin, and that the only alternatives presented were liquidation through a receiver or an outright sale" (*id.* at 299) and that the sale was made "in order to avoid * * * a more disastrous fate" (*id.* at 301). Here, there is no evidence that sale was made as an alternative to the "more disastrous fate" of "financial ruin." On the contrary, the evidence indicates that the president of HHM held out for an attractive price. Cf. *Erie Sand and Gravel Co.* v. *Federal Trade Commission,* May 29, 1961 (C.A. 3), 1961 Trade Cases, Par. 70,028.

Again, in *International Shoe,* the Court pointed out that the sale was made "to the only available purchaser" (280 U.S. at 301) and that "there [was] no other prospective purchaser" (*id.* at 302). See, also, *Erie Sand and Gravel Co.* v. *Federal Trade Commission, supra.* Here, the district court concluded (Fdg. 26, Concl. of Law 4) that "Diebold was the only bona fide prospective purchaser able and willing to pay $3,000,000 and to assume the liabilities of HHM." But this indicates only that Diebold was the only purchaser who met the precise terms on which the sale was made. There were three other prospective purchasers who had indicated an interest in acquiring the

business (none of them in competition with HHM). One of these (Boyce) had inspected HHM's plant, submitted detailed financial figures, named a large investment banking firm to form a purchasing group, and made plans for a public offering.

Even if one could assume (which we dispute) that HHM was in a state of imminent financial collapse and that one of the other prospective purchasers might not have made as good an offer as Diebold, that would not necessarily have justified the acquisition under the "failing company" doctrine. For the theory of the doctrine is that an acquisition of a company that would otherwise cease operating and disperse its assets does not substantially lessen competition. Where, however, there is more than one prospective purchaser, the comparative effect upon competition of sales to different purchasers may be significant, and a sale to the highest bidder may violate Section 7 if a sale to a lower bidder would better fulfill Section 7 objectives. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 346-347; Note, 68 Yale L. J. 1627, 1666-1668.

2. The ruling below permitted one of three dominant firms in the bank vault equipment field to acquire the third largest firm without a searching inquiry into the company's total financial picture and without considering the comparative effect upon competition of sales to other potential purchasers. A trial was deemed unnecessary. The district court's disposition, if permitted to stand, is likely to have a significant bearing upon a vital objective of the 1950 amendment to Section 7 of the Clayton Act: "to limit future increases

in the level of economic concentration resulting from corporate mergers and acquisitions." S. Rep. 1775, 81st Cong., 2d Sess. 2, H. Rep. 1191, 81st Cong., 1st Sess. 2; *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 583 (S.D.N.Y.). Its ruling is also likely to increase "an inevitable temptation to introduce evidence of financial instability in an attempt to have the ambiguities of the case resolved in favor of the merger." Bok, *supra*, 74 Harv. L. Rev. at 341. The "temptation" has in fact already attracted a number of acquiring companies to rely on the "failing company" doctrine in recent cases. See, *e.g.*, *Crown Zellerbach Corp.* v. *Federal Trade Commission*, June 5, 1961 (C.A. 9), 1961 Trade Cases, Par. 70,038, at p. 78,168, affirming 54 F.T.C. 769; *Erie Sand and Gravel Co.* v. *Federal Trade Commission*, May 29, 1961, (C.A. 3), 1961 Trade Cases, Par. 70,028; *Pillsbury Mills, Inc.*, CCH Trade Reg. Rep. (1960-1961 FTC Cas.) Par. 29,277 at pp. 37,628-37,630 (pending on petition to review, C.A. 5); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 565 n. 44 (E.D. Pa.); *United States* v. *Maryland and Virginia Milk Producers Assn.*, 167 F. Supp. 799, 808 (D.D.C.); *Farm Journal, Inc.*, 53 F.T.C. 26, 47-48.

In sum, we submit (a) that the proofs tendered by Diebold were insufficient to warrant the entry of a summary judgment and (b) that those offered by the United States affirmatively required rejection of the "failing company" defense.

CONCLUSION

The question presented by the appeal is substantial and of public importance. Probable jurisdiction should accordingly be noted.

Respectfully submitted.

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AUGUST, 1961.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil Action No. 4485

UNITED STATES OF AMERICA, PLAINTIFF,

v.

DIEBOLD, INCORPORATED, and HERRING-HALL-MARVIN SAFE COMPANY, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW, MARCH 1, 1961

Description of Acquisition

1. On September 11, 1959, Diebold, Incorporated (Diebold) acquired the assets of Herring-Hall-Marvin Safe Company (HHM) for $3,000,000 cash and the assumption of all liabilities.

2. The acquisition resulted from an offer, in May 1959, by Mr. Mosman, president of HHM, of a quick cash sale of the assets of HHM to Diebold. As a basis for negotiating the sale, Mr. Mosman tendered Diebold a balance sheet as of April 30, 1959, which reflected that HHM had a cash balance on that date of $115,507.32. Both the option agreement between Diebold and HHM of June 16, 1959, and the purchase agreement of July 17, 1959, referred to and were based on the balance sheet of April 30. Subsequently, and prior to the execution of the option agreement, Mr. Mosman informed Diebold he could not warrant the balance sheet of April 30, 1959, because, for the purpose of that sheet, he had reclassified $100,000 of "receivables" as "cash". A recent audit of the books of HHM discloses that the balance sheet of April 30, 1959, also failed to reflect $28,165.36 of outstanding April payroll

checks. Instead of the purported cash balance of $115,507.32 on April 30, 1959, HHM actually had a net overall deficit cash balance (overdrafts outstanding) of $12,658.04.

3. At the closing of the purchase on September 11, 1959, Diebold representatives were informed that HHM could not present a check for the balance in its principal depository, the First National Bank and Trust Company of Hamilton, because that account was overdrawn by approximately $50,000. Checks were tendered for small amounts in other banks ranging from $800 to $9,477.90. Actually, the HHM account at the First National Bank and Trust Company of Hamilton had overdrafts outstanding on September 10, 1959, of $53,978.59. Crediting against this deficit the smaller amounts in other banks, HHM, on September 10, 1959, had a net overall deficit in all bank accounts in the amount of $35,596.61.

Financial Condition of HHM During 1959

4. At all times between June 1950 and September 11, 1959, when HHM was acquired by Diebold, HHM had been short of working capital and, from 1953 on, HHM had found it necessary to make frequent use of bank loans on a straight note basis to finance the company's annual sales volume.

5. In an effort to improve its net working capital position, HHM consistently retained substantially all of its earnings after taxes and the proceeds from the periodic liquidation of its readily disposable divisions and subsidiary companies. In 1954, the company received and retained $150,000 in insurance proceeds resulting from the complete destruction by fire of the facilities of its subsidiary, Thomas Manufacturing Company. In fiscal 1955, it sold its Quickdraft division

for $100,000 on time payments. In fiscal 1959, it sold its Remington division for $98,000 and its Canadian subsidiary for $130,000.

6. HHM's balance sheets from June 1950 down through 1958 continuously reflected liabilities well in excess of tangible net worth, and its current ratio (the relationship of its current assets to its current liabilities) averaged only approximately 1.5 for the years 1951 through 1959 in contrast with an average of 2.7 during the same years for all manufacturers of fabricated metal products. By June of 1959, HHM's cash position was such that its net quick asset ratio (the relationship between cash and government securities on the one hand and current liabilities on the other) dropped to .074, the lowest in HHM's experience since 1951 and less than one-fifth the average net quick ratio of all companies in the fabricated metal products industry. By September 11, 1959, when Diebold acquired HHM, HHM's net quick asset ratio had declined to .03.

7. HHM's sales reached a peak in 1956-57 when the company had net sales of $10,672,000. In each of the next two years, fiscal 1958 and fiscal 1959, HHM's sales fell approximately $300,000 each year under the preceding year, to a low for fiscal 1959 of $10,023,000.

8. As sales fell in fiscal 1959 by approximately $300,000, inventories built up in the amount of $262,000.

9. Subsequent examination of the books and records of HHM disclosed the following financial condition that faced the company as the year 1959 wore on: out of 114 working days between April 1, 1959, and the consummation of the sale on September 11, 1959, HHM had overdrafts outstanding against balances in its principal depository (First National Bank and Trust Company of Hamilton) on 69 days (60% of the working days) in amounts ranging from $104.51 to $78,394.58. Simi-

larly, the company had total net overdrafts outstanding on all of its commercial bank accounts on 41 days during the same period in amounts varying from $1,123.72 to $66,890.68.

10. Subsequent examination and audit of HHM accounts also disclosed that: (1) during the entire month of May 1959 the regular payroll account of HHM in the First National Bank and Trust Company of Hamilton had payroll overdrafts outstanding in amounts ranging from $24,466.29 to $54,297.52; (2) during at least half the month of May the overdrafts on the regular payroll account were subsequently reimbursed by overdrafts on HHM's general account in the First National Bank and Trust Company of Hamilton which account itself had overdrafts outstanding in amounts ranging from $38,551.37 to $116,809.86; and (3) on May 1, 1959, the HHM accounts in all banks had overdrafts outstanding against them in the amount of $79,037.17, and on May 8, the accounts in all banks had overdrafts outstanding in the amount of $57,325.79.

11. The annual examination by the HHM auditors of the books of account disclosed that the June 30, 1959, balance sheet of HHM which purported to reflect a net cash balance in the regular account at the First National Bank and Trust Company of Hamilton, Ohio, of $35,942.21, failed to reflect outstanding checks in the amount of $46,858.62. When adjustment was made by the auditors to account for these undisclosed and outstanding June checks, HHM was shown to have had overdrafts outstanding on the regular account of the First National Bank and Trust Company of Hamilton as of June 30, 1959, in the amount of $10,916.41.

12. Recent audit of the HHM books and records also discloses that while HHM apparently had $13.92 on deposit in the First National Bank and Trust Company on September 3, 1959, the company actually had

overdrafts outstanding as of September 3 on this bank in the amount of $73,127.80.

13. HHM's bank statements showed modest minimum monthly balances in its principal depository, the First National Bank and Trust Company of Hamilton: January, $97,535; February, $142,586; March, $75,743; April, $6,143; May, $27,871; June, $44,741; July, $33,731; August, $55,308; September, $13. These bank balances do not properly reflect the financial condition of HHM because (1) they failed to reflect the outstanding checks sent to creditors which represented overdrafts that had not yet cleared the bank on 60% of the working days between April 1 and September 11, 1959; and (2) they failed to reflect an inflation of bank balances created by the company itself through transfer, from time to time, of funds by check within its own bank accounts, e.g., on January 30, 1959, HHM drew a check for $34,000 on Wells Fargo Bank (San Francisco) for deposit in Irving Trust Company (New York); on the same day, a check for $34,000 was drawn on Irving for deposit in Peoples First National Bank and Trust Company (Pittsburgh); and on the same date, a check in the amount of $34,000 was drawn on Peoples for deposit in the First National Bank and Trust Company (Hamilton, Ohio). HHM only had one $34,000 deposit to transfer, but on February 2, 1959, the total aggregate balances reflected in all four banks credited $136,000.

14. On December 30, 1958, HHM borrowed $250,000 on demand notes from its principal depository, the First National Bank and Trust Company of Hamilton, which was limited by law to an indebtedness of $300,000 to any one customer. On May 6, 1959, HHM, again on demand notes, increased its loan to the limit of $300,000. On May 13, 1959, the loan was reduced to $250,000, but on September 11, 1959, HHM, again on

demand notes, increased its loan to the limit of $300,000. On deposition, the president of the bank testified that the bank did not wish to carry this loan at the legal limit permanently and that if the bank had called upon HHM to pay off the demand notes, he did not know where the company could have obtained the funds to do so. Defendant Diebold paid off the $300,000 of HHM demand notes on September 16, 1959.

15. In March 1959, at the expiration of its annual contract, the HHM Union, Safe Workers Organization, Chapter 1, presented the company with demands for wage costs which were higher than those common in the area or the industry. These demands placed the company at a competitive disadvantage by increasing wage costs and decreasing efficiency. Because of its limited working capital position and the highly competitive nature of the industry in the spring of 1959, the company could not stand a strike, and it finally accepted the Union's terms. Before accepting these terms, however, the president of HHM, Mr. Mosman, gave serious consideration to recommending to the Board of Directors that the company be liquidated.

16. Examination and audit of the books of account of HHM immediately upon Diebold's taking possession of them reflected the fact that the company had suffered operating losses between July 1 and September 10, 1959, of $206,953.51.

17. Subsequent examination and audit of the books of account of HHM reflected that as of September 11, 1959, HHM had accumulated past due trade bills dating back to prior to January 1959 in the amount of $244,127.68. In addition to this amount of past due accounts, HHM on September 11, 1959, also had currently due trade bills in the amount of $499,833.66.

18. HHM followed the procedure of preparing commercial accounts' checks at the time the invoices were

approved, but of not releasing them until later because of lack of funds on the due date. As a result, a lapse of between 30 and 120 days between preparation of a check and its issuance and cancellation by the bank was not unusual. During the first 9 months of 1959, the following checks cleared the bank more than 30 days after the date of the check: January, 208; February, 142; March, 134; April, 134; May, 146; June, 107; July, 137; August, 175; September 1-11, 29. Illustrative of this practice were checks Nos. 17470 and 17471 drawn to the order of the Aluminum Company of America for $3,349.61 and $16,494.41, respectively, both dated January 15, 1959, and both canceled by the bank on April 10, 1959, although on December 30, 1958, the Aluminum Company of America specifically declined a request of HHM that its 30 days net credit terms be extended to 90 days.

19. As a result of the overdraft disclosed to Diebold at the closing on Friday, September 11, 1959, Diebold caused $200,000 in cash to be deposited in the First National Bank and Trust Company of Hamilton on the second next banking day, September 15, 1959. Shortly thereafter, on September 28, 1959, Diebold deposited an additional $300,000 in cash in the First National Bank and Trust Company of Hamilton. A subsequent deposit on October 22, 1959, brought the aggregate cash advances by Diebold between September 15 and October 22, 1959, to a total of $503,801.90 to meet current and past due obligations of HHM. By July 31, 1960, these cash advances aggregated $840,000.

20. Although the annual balance sheets and profit and loss statements purported to show a modest improvement in HHM's financial condition from year to year, these "book" figures failed completely to reflect the actually insolvent condition of the company. The books were prepared in accordance with manage-

ment policy. The Treasurer of HHM was informed by the President on June 16, 1958, of the following "goals for June 30, 1958" (fiscal year-end): "I would like to show a net profit, after taxes, of at least $150,000" and "I would like to show a net worth of approximately $2,100,000." The Treasurer noted "OK" on these instructions, and the June 30, 1958, balance sheet showed net worth of $2,126,502 and the profit and loss statement showed net profit after taxes of $188,814. These figures were confirmed by HHM's auditors.

21. Upon the disclosure to Diebold at the closing on September 11, 1959, that HHM had overdrafts outstanding against its bank balances and upon the discovery that HHM had suffered an operating loss of $206,000 between July 1, 1959, and September 11, 1959, Diebold immediately called in H. B. Maynard and Company, independent management consultants, to conduct a survey of operations in the Hamilton plant of HHM. Maynard engineers spent approximately six weeks in the plant surveying manufacturing techniques, worker efficiency, and managerial and supervisory competence. As a result of this survey, Maynard and Company prepared performance reports which indicated (1) manufacturing methods in the HHM plant were poorly conceived and inadequately supervised; (2) tooling and equipment lacked modern design and showed little ingenuity or imagination; and (3) labor performance achieved only a level of 70-75% of standard as compared with the 92-93% level of performance assumed to exist by the old HHM management. The Maynard report concluded that HHM was a high-cost producer which could exist only as a marginal operation and which could probably not survive in a highly competitive market. The survey indicated that substantial cost reductions could and should be immediately initiated in the HHM plant.

22. Correction of many of the deficiencies found in the HHM plant by the Maynard engineers required revision of the uneconomic Union contract which Diebold acquired from HHM and which produced low productivity and high wage costs on the Hamilton plant. In March 1960, Diebold began bargaining with the Union, seeking to get improved productivity in this plant. The bargaining dragged on through March, April, May and June. Diebold finally notified the Union that unless it could work out a contract which would give it reasonable productivity so as to make the plant competitive, the losses it was incurring in the operation of the plant would force Diebold to close it. On July 7, 1960, the Union signed a two-year contract that (1) eliminated the arbitrary wage escalator clause that had permitted uncontrolled inflation of costs, (2) removed the prior prohibitions on wage incentive plans and provided for a wage incentive plan, and (3) gave Diebold a two-year contract, thus avoiding the cost, time, and uncertainty of year to year bargaining.

23. Operations of the HHM Division of Diebold continued during the first seven months of 1960 to reflect losses, culminating in a loss of $106,000 for the month of July 1960.

24. In addition to the deficiencies in manufacturing performance at the HHM plant, there has been a sharp loss in business by HHM Division. In the eight months ended August 31, 1960, orders entered by the HHM Division declined $2,307,707, or 29.8% from the similar eight-month period of 1959. Excluding government orders, the decline in commercial business was even more severe, aggregating 40% under the first eight months of 1959. Shipments for the first eight months of 1960 exceeded new orders by $449,000, or approximately 10%, and by January 31, 1961, orders shipped

had fallen to a level of approximately $409,000 per month, or $4,900,000 annually.

25. The decline in sales and shipments of the HHM Division has required the continuous lay-off of employees at the Hamilton plant, including a lay-off of 95 employees on February 1-4, 1961. Employment at the plant has declined from 664 employees on September 11, 1959, to 370 on January 31, 1961, a total decline of 294 employees, or approximately 45%.

26. When a rumor spread around during the latter part of 1958 and the first half of 1959 that the stock or assets of HHM might possibly be for sale, three different promoters solicited the HHM ownership-management to consider tentative schemes for acquiring, merging, or exchanging the stock or assets of HHM. None of these overtures ever approached the concreteness of a firm offer or a firm price and no financial data or operating figures were supplied by HHM. Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities.

27. Diebold was in need of additional plant space to which it might remove part of its production from its overcrowded facilities in Canton, Ohio, where efficient, economical expansion was not feasible.

Conclusory Findings

28. At the time of its acquisition by Diebold on September 11, 1959, and for at least 9 months prior thereto, HHM was hopelessly insolvent and faced with imminent receivership.

29. The facts concerning HHM's true financial condition were never disclosed to Diebold or to any of the promoters mentioned above. HHM's opportunity to achieve a sale on the terms it sought, and obtained from Diebold, was contingent upon the swift conclusion of a sale without exhaustive analysis of its books

and records. Diebold was in need of additional plant space to handle existing business. It purchased on HHM's terms, in reliance on HHM's representations, without full access to HHM's books and records.

30. Diebold was the only bona fide prospective purchaser for HHM's business. Aside from Diebold, no one else ever made an actual offer for HHM's business or property.

31. Diebold's acquisition of HHM did not threaten, or actually cause, a lessening of competition within the meaning of Section 7 of the Clayton Act. By reason of its precarious financial condition, HHM could not long have survived as an independent competitor in its line of business and could not have achieved a sale to anyone else. But for the sale to Diebold, HHM would have been forced to liquidate its business in insolvency proceedings, with resultant heavy losses to employees, creditors, and stockholders.

Conclusions of Law

1. The Court has jurisdiction over the defendants and the subject matter of this suit.

2. There is no genuine issue as to any material fact.

3. HHM, at the time of its acquisition, was a failing company with resources so depleted and the prospect of rehabilitation so remote that it faced imminent receivership with resulting loss to its stockholders and injury to the community where its plant was operated.

4. Diebold was the only bona fide prospective purchaser able and willing to pay $3,000,000 and to assume the liabilities of HHM.

5. The defendant Diebold is entitled to judgment as a matter of law.

(Sgd) JOHN H. DRUFFEL,
U. S. D. J.

Dated: March 8, 1961.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil Action No. 4485

UNITED STATES OF AMERICA, PLAINTIFF,

v.

DIEBOLD, INCORPORATED, AND
HERRING-HALL-MARVIN SAFE COMPANY, DEFENDANTS.

JUDGMENT

This cause was heard on Defendant Diebold's Motion for Summary Judgment, and the Court having considered the motion, the pleadings, the affidavits and depositions on file, and being fully advised in the premises, it is

ORDERED AND ADJUDGED, that Defendant Diebold's Motion for Summary Judgment be and the same is hereby granted.

(Sgd) JOHN H. DRUFFEL,
U. S. D. J.

[Filed March 8, 1961.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA,
Appellant,

v.

DIEBOLD, INCORPORATED,
Appellee.

On Appeal from the United States District Court for the Southern District of Ohio

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA,

Appellant,

v.

DIEBOLD, INCORPORATED,

Appellee.

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of this Court, moves that the judgment of the District Court be affirmed on the ground that the question on which the decision of the cause depends is so unsubstantial as not to warrant further argument.

* * *

QUESTION PRESENTED

Whether the undisputed facts supported the District Court's factual conclusion that Herring-Hall-Marvin Safe Company was so hopelessly insolvent at the time of its acquisition by appellee that the acquisition could not violate § 7 of the Clayton Act. *International Shoe Co.* v. *FTC*, 280 U.S. 291.

STATEMENT

This is an appeal from a judgment of the District Court for the Southern District of Ohio, in favor of appellee Diebold, Incorporated (Diebold), in a suit by the Government under § 7 of the Clayton Act, challenging Diebold's acquisition of the assets of Herring-Hall-Marvin Safe Company (HHM). Before trial of the Government's affirmative case,[1] the Court concluded, on the proofs of both parties submitted on Diebold's motion for summary judgment, that the acquisition did not violate § 7 because, at the time thereof, HHM was a "failing company."

The District Court found that there was no genuine issue as to any material fact, and concluded that at

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[1] Appellant's claim (J.S. 15) that except for the "failing company" issue, Diebold's acquisition of HHM was a violation of the antitrust laws, is pure assertion. It was roundly denied in Diebold's answer, and no trial of the matter has been had. Neither is the Government's bland assertion (J.S. 4, 20), that Diebold and HHM were two of only three "dominant" companies engaged in producing for the relevant market, supported by proof. In the first place the definition of "relevant market" is a question of bewildering complexity here. Bank equipment is largely nondistinguishable from office equipment generally and the largest companies in the field, such as Remington-Rand and Shaw-Walker, manufacture a general line of safes and office equipment used by banks. An equally large portion of Diebold's annual business is general office equipment designed alike for insurance companies, municipal offices, factory offices and banks. (Koontz Dep., pp. 10-11, 13, 18-19, 34-36, and Aff. I, ¶32, 34-39; Mosler Dep., pp. 228-29). Diebold's position is that there are numerous companies producing for its market, many of them (like Remington-Rand) far larger than operations the size of HHM and Diebold. (Koontz Dep., p. 34, Aff. I, ¶36-41; Mosler Dep., pp. 230-45). But even if a long trial succeeded finally in winnowing out a small line of equipment suitable only for banks, to speak of Diebold or HHM as "dominant" companies in a small, highly specialized field dominated by gigantic financial institutions such as Chase Manhattan and Bank of America is to lose all sense of reality.

the time of its acquisition by Diebold, on September 11, 1959, and for at least nine months prior thereto, HHM was hopelessly insolvent and faced imminent receivership.

It found that because of its precarious financial condition, HHM could not long have survived as an independent competitor in its line of business. But for the sale to Diebold, concluded the Court, HHM would have been forced to liquidate its business in insolvency proceedings, with resultant heavy losses to employees, creditors, and stockholders. (Fdgs. 28, 31)[2]

With respect to certain other parties who at times had made overtures with respect to HHM, the Court found that "none of these overtures ever approached the concreteness of a firm offer or a firm price and no financial data or operating figures were supplied by HHM." It found that Diebold purchased on HHM's

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[2] Since the record as filed in this Court by appellant is not paginated, references to the record herein are in the form of references to particular record documents. "Fdg." refers to the District Court's findings by number; "Robinson Aff. I" refers to Robinson's five-page affidavit, filed with the summary judgment motion in January, 1961, "Robinson Aff. II" refers to his four-page affidavit filed March 1, 1961, and "Robinson Aff. III" refers to his two-page affidavit filed the same day; "Lybrand Rep. #1" refers to the "Report on Review of Certain Accounts and Records as of Various Dates During 1959" of Lybrand, Ross Bros. & Montgomery; "Lybrand Rep. #2" refers to that firm's "Summary Schedules of Assets, Liabilities, Shareholders' Equity and Operations"; and "Lybrand Rep. #3" refers to that firm's "Comparison of Company Statistical Data with that of Industry", all three of which reports were exhibits to Robinson Aff. I; "Mosman Aff." refers to his affidavit executed January 5, 1961; while "Mosman Rep. Int." refers to his affidavit making response to appellant's Interrogatories, executed January 13, 1961; "Koontz Aff. I" refer to his affidavit of September 1, 1960, filed in opposition to appellant's motion for preliminary injunction; "Koontz Aff. II" refers to his affidavit filed with the motion for summary judgment. Other references are self-explanatory.

terms, in reliance on HHM's representations, without full access to HHM's books and records. It concluded that Diebold was the only *bona fide* prospective purchaser for HHM's business; that no one else ever made an actual offer for HHM; and that by reason of its precarious financial condition, HHM could not have achieved a sale to anyone else. (Fdg. 26, 29, 30, 31). Accordingly, it ruled that appellee was entitled to judgment as a matter of law, under the "failing company" doctrine of the *International Shoe* case.

Since this case turns on its own facts as they were developed before the District Court, we make a full statement of the undisputed basic facts relating to the failing-company issue, as presented to the Court below.

The acquisition.—On September 11, 1959, Diebold acquired the assets of HHM for $3,000,000. The acquisition resulted from an offer by Warren Mosman, President of HHM, of a quick cash sale of HHM's assets. (Fdgs. 1 & 2).

HHM's long-term financial background.—The financial background of HHM before the acquisition shows a pattern of a long-term expansion of sales, on a totally inadequate working capital base, followed by a two-year period of constriction in its business, with the last year featured by a desperate shortage of essential working capital to support the business' operations. From June, 1950, to the 1959 acquisition, HHM had been short of working capital, and down through 1958, HHM's balance sheets continuously reflected liabilities in excess of its tangible net worth. (Fdgs. 4 & 6; Mosman Aff., p. 2; Lybrand Rep. #3, Sched. 1). Its current ratio (relationship of its current assets to its current liabilities) averaged only approximately 1.5 for the years 1951 through 1959, in contrast with

an average of 2.7 during the same years for all manufacturers of fabricated metal products. (Fdg. 6; Lybrand Rep. #3, Scehd. 1). Against this backdrop of a continually "thin" current position, HHM's net sales rose from $5,023,270 in 1949, to $6,898,633 in 1954, and to $10,672,279 in 1957. (Singman Aff., Ex. 7; Mosman Aff., p. 1).

During the fifties, although the annual balance sheets and profit and loss statements of HHM purported to show a modest annual improvement in HHM's financial condition, these "book figures" failed completely to reflect the actual condition of the company. The books were made up in accordance with management policy. For example, the Treasurer of HHM was informed by Mosman in a "Personal and Confidential" memorandum on June 16, 1958, of the following "goals for June 30, 1958" (the end of the fiscal year): "I would like to show a net profit after taxes of at least $150,000" and "I would like to show a net worth of approximately $2,100,000." The Treasurer endorsed "O.K." on the memo, and as of June 30, 1958, the profit and loss statement showed a net profit after taxes of $188,814, and the balance sheet, a net worth of $2,126,502. (Fdg. 20; Robinson Aff. II, Ex. 4).

The 1959 current position.—By 1959, the company was falling substantially below its sales goals, and, in fact, net sales had shrunk by approximately $300,000 per year from the peak year of 1957 (Fdg. 7; Mosman Aff., pp. 1-2); and the shortage of working capital to which the company had been subject for years had become acute. In June, 1959, HHM's current position was such that its net quick asset ratio (the relationship between cash and government securities on the one hand and current liabilities on the other) had dropped to

.074. This means that HHM's cash and government securities, as of that month, amounted to only 7.4% of its *current* liabilities. The average figure for all companies in the fabricated metal products industry was 37%—five times HHM's figure. (Fdg. 6; Mosman Aff., p. 3; Lybrand Rep. #3, Sched. 2).

Internal cash generation inadequate despite partial liquidations.—This adverse net working capital position obtained despite the retention by HHM of substantially all of its earnings after taxes and of the proceeds, totaling close to a half million dollars, from periodic liquidations of productive assets. In 1954, the company had received and retained $150,000 in insurance proceeds resulting from the destruction by fire of the facilities of a subsidiary. In fiscal 1955, it sold a division for $100,000. In fiscal 1959, it had sold another division for $98,000, and a subsidiary for $130,000. (Fdg. 5; Mosman Aff., pp. 2-3). During this period, annual dividends paid in this fairly closely held corporation were less than $12,000, the last such being paid in the fiscal year commencing July 1, 1958.[3] (Singman Aff., Ex. 1-6).

The 1959 union contract.—In March of 1959, HHM's union presented HHM with demands for wage costs which were higher than those in the area or in the industry. Because of its extremely weak working-capital position the company could not stand a strike, and it finally accepted the union's terms. Before accepting these terms, Mosman gave serious consideration to liquidation. (Fdg. 15; Mosman Aff., pp. 3-4).

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[3] Appellant's reference to "dividends of $2.00 a share" (J.S. 10) becomes a little more meaningful when it is understood that less than 6,000 shares of stock were outstanding during this period.

Operating losses.—In fiscal 1959, sales were falling by approximately $300,000 at an annual rate. During the same period, inventories built up by $262,000. (Fdg. 8; Lybrand Rep. #2, Sched. 1; Mosman Aff., pp. 1-3).

It was later revealed that, between July 1 and September 10, 1959, HHM had suffered operating losses of $206,953.51. (Fdg. 16; Robinson Aff. I, ¶5).

Badges of insolvency.—The company's desperate cash and working capital position gave rise to the following manifestations, which generally were not discovered by Diebold until after the purchase was closed:

(*a*) *Repeated overdrafts.*—The company had checks drawn and outstanding in excess of its actual balance on account at its principal depositary (The First National Bank and Trust Company of Hamilton) on 69 of the 114 working days between April 1, 1959 and the consummation of the sale on September 11, 1959. These overdrafts[4] ranged in amount from $104.51 to $78,394.58.[5] The company had total net overdrafts,

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[4] Appellant suggests that it may be somewhat harsh to call HHM "overdrawn" since none of its checks actually were refused payment when presented—it simply had more checks drawn and outstanding than the money it had deposited with its banks would permit! (J.S. 17, n. 10). We submit that most reputable firms and individuals would consider this an overdraft. What HHM obviously was doing was writing overdrafts and trusting that there would be a sufficient "float" of incoming items deposited by it in time to cover them.

[5] HHM's bank balances reflected modest minimum monthly balances during 1959—as low as $13.82 in September. (Fdg. 13) These balances did not properly reflect its condition, because they failed to reflect the overdraft checks sent to creditors, not yet having cleared the bank, which gave it an overdrawn position on 60% of the working days between April 1 and September 11. The statements also did not reflect the inflation of bank balances created through the extraordinary procedure described in (*c*) below, page 8.

in amounts varying from $1,123.72 to $66,890.68, outstanding on *all* of its commercial bank accounts on 41 days during the same period. (Fdg. 9; Robinson Aff. I, ¶7, & Ex. 1).

(*b*) *Settling overdrafts through overdrafts.*—It was subsequently disclosed that on every pay day during the entire month of May, 1959, the regular payroll account of HHM in its principal depositary had payroll overdrafts outstanding in amounts ranging from $24,466.29 to $54,297.52. During at least half of this month, the overdrafts on the regular payroll account were subsequently reimbursed by overdrafts on the company's general account in the same bank. The general account itself was overdrawn in amounts ranging up to $116,809.86. During this period, the HHM accounts in all banks had net overdrafts outstanding against them in substantial amounts—as much as $79,037.17. (Fdg. 10; Robinson Aff. I, ¶8; Lybrand Rep. #1, Sched. C).

(*c*) *Creation of fictitious balances through multiple deposits and withdrawals*—The following extraordinary transaction was repeated on numerous distinct occasions. On January 30, 1959, HHM drew a check for $34,000 on a San Francisco bank for deposit in a New York bank; on the same day, a check for the same amount was drawn on the latter bank for deposit in a Pittsburgh bank; and on the same date, a check in the same amount was drawn on the Pittsburgh bank for deposit in HHM's Hamilton bank. Thus by the simultaneous transfer and retransfer of a single $34,000 deposit, on February 2, 1959, HHM was able to create a total aggregate balance of $136,000 in these four widely scattered banks. The same *modus operandi* (bearing striking resemblances to what is popularly

called "kiting") was followed by HHM on six other occasions in the first half of 1959. (Fdg. 13; Robinson Aff. II, ¶2 & 3)

(*d*) *Heavy use of demand loans.*—During the period in question, HHM borrowed money on a demand note basis from its principal bank depositary in Hamilton. The bank was limited by law from making loans in excess of $300,000 to any one customer. During 1959, the demand notes never fell below $250,000, and on two occasions, the amount was raised to the legal limit. The bank did not wish to carry this loan at the legal limit permanently, and if the bank had called upon HHM to pay off the demand notes, the bank President did not know where HHM could have obtained the money to do so,[6] and believed that, in fact, it would not have obtained the money. (Fdg. 14; Fitton Dep., pp. 100, 107-8, 125).

(*e*) *Slow payment of trade accounts.*—Another interesting source of financing by HHM during the period in question was the device of preparing and dating checks for its trade creditors at the time the invoices were approved, but of not releasing them until later. As a result, a lapse of between 30 and 120 days between preparation of a check and its issuance and cancellation by the bank was not unusual. In 1959,

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[6] Curiously enough, appellant's analysis seems to view this extraordinary loan transaction as an indication of HHM's financial strength. (J.S. 11) Obviously, no company in sound financial health borrows heavily on *demand* notes except as a last resort because such notes subject it to the arbitrary "call" of the bank. HHM's obtaining of this loan, under the circumstances, indicated no ability to borrow on normal "term" paper the enormous additional sums that would have been necessary to enable it to meet its past-due and current obligations, not to mention to survive on its own power.

before the acquisition, at least 100 HHM checks per month cleared the bank over thirty days after the date of the check. An interesting example of this practice appears in the condition of HHM's account with Alcoa. The latter had declined HHM's request in December, 1958, that its "30 days net" credit terms be extended to 90 days. HHM then proceeded to effect the extension itself by holding up Alcoa's checks for periods of close to 90 days. (Fdg. 18; Robinson Aff. II, ¶4, & Exs. 2 & 3; Ziegler Dep., pp. 49-50).

HHM's position at the time of the closing.—By the time of the September 11 closing, HHM's net quick asset ratio had declined to .03—its cash and government securities were equivalent only to 3 per cent of its current liabilities. (Fdg. 6; Robinson Aff. II, ¶5). It had a nominal bank balance in its principal depositary of $13.92 at the start of September—and even then its checks in the amount of $113,000 were in the hands of its creditors. At the closing HHM declined to tender a check to Diebold in settlement of this bank account, on the ground that the account was actually overdrawn on account of outstanding checks. The overdraft in this account as of the day before the closing was $53,978.59. If against this deficit there be credited its smaller positive balances in other banks, HHM on the day before closing had a net overall deficit in all bank accounts in the amount of $35,596.61. (Fdgs. 3, 9; Robinson Aff.I, ¶3; Lybrand Rep. # 1, Sched. A).

As stated, it was later discovered that between the beginning of the 1960 fiscal year on July 1, 1959, and the closing, HHM had suffered operating losses of $206,953.51. (Fdg. 16; Robinson Aff. I, ¶5). As of the closing, it had accumulated past due trade bills payable, dating back prior to January, 1959, in the amount

of $244,127.68. In addition to these past due bills, at the closing, HHM also had currently due trade bills payable in the amount of $499,833.66. (Fdg. 17; Robinson Aff. I, ¶ 6; Lybrand Rep. # 1, Sched. E). Upon acquiring HHM, Diebold immediately commenced advancing cash to HHM, and within the next three weeks it had advanced a total of $500,000.00 to meet current and past due obligations of HHM. (Fdg. 19; Lybrand Rep. #1, Sched. F).

Disclosures after the closing.—In the period immediately after the acquisition, the facts concerning HHM's desperate financial condition came to light.[7] They had not been known to Diebold before the acquisition.[8] Diebold then caused audits to be made of HHM's finances, and an operations survey to be made by independent management consultants. The consultants' report indicated poor supervisory methods, unsound and obsolete design of tooling and equipment, and unsatisfactory labor application. The report concluded

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[7] Appellant spends considerable space (J.S. 5-6, 12-13) in an effort to suggest that the raising of the failing-company issue was some kind of afterthought. This ignores the fact that at the time Diebold acquired HHM, Diebold was almost wholly ignorant of the facts concerning its finances. (See note 16, *infra*). Indeed, these facts came to light only after the closing occurred, and Diebold had taken possession of HHM. This was, of course, after the commencement of this litigation (which occurred over two weeks before the closing) and after the filing of many of the papers referred to by appellant.

[8] There is one minor exception. In May, 1959, Mosman told Diebold that, on the HHM April 30, 1959 interim balance sheet, he had reclassified $100,000 of receivables as cash. (Robinson Aff. I, ¶2). This was, as the statement of facts makes evident, hardly even chapter one in a complete financial story of HHM; and the proofs are clear that the rest of the HHM picture was learned by Diebold only after the closing. (See Fdgs. 16, 17, 18, 21, 29; Robinson Aff. I, ¶4-12; Koontz Aff. II, ¶1-2).

that HHM was a marginal operation. (Fdg. 21; Koontz Aff. II, ¶ 2).

Continued decline in business and continued cash needs.—After the acquisition, the pattern of losses continued, although, of course, now covered by Diebold's cash advances. Operations of the HHM Division of Diebold continued to reflect losses through the first seven months of 1960, culminating in a loss of $106,000 for the month of July, 1960. In the eight months ending August 31, 1960, new orders entered by the HHM Division declined $2,307,707, or 29.8 per cent, from the same eight-month period in 1959. Other indicators showed a continual decline in business. (Fdgs. 23 & 24; Koontz Aff. II, ¶ 4-5).

Cash advances, despite the shrinkage of the business, continued; by June 30, 1960, Diebold's cash advances to the HHM Division had been increased to $840,000. (Fdg. 19; Koontz Aff. II, ¶ 7). The decline in sales and shipments of the HHM Division required the continual lay-off of employees in HHM's main plant at Hamilton, Ohio. Employment at the Hamilton plant declined from 664 employees on September 11, 1959, to 370 on February 10, 1961, a total reduction of 294 employees, or approximately 45 per cent. (Fdg. 25; Robinson Aff. II, ¶ 6, and Ex. 1).

The so-called alternative purchasers.—Appellant has suggested that there were non-competing prospective purchasers who were "interested" in acquiring the business of HHM. (J.S. 13). Apparently, the references are to the following:

(*a*) *Colonel T. C. Davis.* One Van Ness, a New York bank employee, heard in the spring of 1959 that a certain Colonel T. C. Davis "might have some pos-

sible interest in trying to arrange an exchange of HHM stock for that of some company in which Colonel Davis had a present interest." Van Ness attempted to bring Mosman and Colonel Davis together. When contacted, "Colonel Davis indicated he had little knowledge of the HHM company, but that he was always willing to explore an investment possibility." Van Ness, after a few contacts with Mosman, and after informing Mosman that he could not predict whether negotiations with Davis held any promise, secured an expression of willingness from Mosman to meet Davis. Colonel Davis evidently then went on a European trip, and no meeting between the parties ever ensued. Notably, no "financial data or operating figures [were] ever supplied to Colonel Davis by Mr. Mosman." (Van Ness Aff., & Exs.).

(*b*) *James H. Boyce*—Mr. Boyce, of Baton Rouge, Louisiana, connected with various enterprises such as a Baton Rouge machinery sales and service company, a local Ford dealership, and an automobile leasing company, contacted Mosman in the middle of 1958, saw his plant in August 1958, and had sporadic contact with him for some time in 1959. In all this period, Boyce states that "a definite offer was never made" by him for the acquisition of HHM.

Boyce's Washington attorney attempted to promote a deal for HHM by soliciting Hayden, Stone & Co., New York investment bankers, circulating a pamphlet outlining a scheme for financing the deal. While this pamphlet was replete with estimates and projections of HHM's future earnings through 1968, Mosman had never made any disclosure of the real condition of HHM's finances to the promoters who prepared it. The solicitation stated that "it should be distinctly

understood that the following in no way constitutes an offer, but rather a basis for discussion," and indicated that the purchase would be made by a "purchasing group"—not yet formed—which might then float a public stock issue. The pamphlet was never brought to Mosman's attention, but Boyce orally mentioned, in discussions which never ripened into an offer, a plan contemplating debt financing in the sum of $1,500,000, or a long-term lease of HHM's fixed assets and outright acquisition only of the rest of the business.

During the period of about ten months during which the Boyce contacts took place, Boyce admits that "a definite offer was never made" by him for the acquisition of HHM. Mosman indicated that he was not interested in a sale for credit, which was always contemplated by Boyce. There was no evidence that Mosman made any financial disclosures to Boyce, of what effect an accurate disclosure of HHM's condition would have had upon Boyce, upon the "purchasing group" the pamphlet contemplated, or upon a prospective financer of the deal. (Boyce Aff., & Exs.; Mosman Rep. Int. 4, 5 & 6).

(*c*) *Lovell Manufacturing Company.*—Lovell Manufacturing Company of Erie, Pennsylvania, deals in clothes wringers and dryers. Representatives of Lovell and HHM had a meeting in April, 1959, at which Mosman mentioned a figure of $3,000,000 in cash. Lovell stated that they were not interested under such circumstances. After the meeting, Lovell wrote HHM, "You can expect to hear further from us within the next few weeks regarding some preliminary ideas concerning the matters which we discussed." Nothing of significance appears to have followed. (Mosman Rep. Int. 4, 5 & 6, & Exs.).

The District Court found that these three interests were but "promoters," who made no actual offer for HHM, that HHM's condition dictated that it make a quick sale without exhaustive analysis of its books and records, and that Diebold was the only *bona fide* prospective purchaser (Fdgs. 29, 30).

ARGUMENT

1. In *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930), the Supreme Court enunciated the following very practical doctrine:

> "In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law . . . would 'seem a distempered view of purchase and result.'" (280 U.S., at 302-03).

This principle has ever since been styled the "failing company" doctrine. The establishment, on the facts of a given case, that the acquired firm was a "failing company" avoids a charge that its acquisition violates § 7 of the Clayton Act.

While the *International Shoe* decision was rendered under the original § 7 of the Clayton Act, the legislative history of the 1950 revision of § 7 makes it perfectly plain that Congress intended the doctrine to be available on the same terms under the Act as amended. The Senate Report declares:

> *"Companies in a failing or bankrupt condition:*
>
> "The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a *failing* or bankrupt condition from selling out.
>
> "The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.
>
> "The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that *a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue.*" (Quoting from *International Shoe*) (Sen. Rep. No. 1775, 81st Cong., 2d Sess. (1950), p. 7, emphasis supplied).

And the House Report:

> "The argument that a corporation in bankrupt or *failing* condition might not be allowed to *sell to a competitor* has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases. In the . . . [*International Shoe* case] the

> Supreme Court went much further . . ." (quoting) (H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949), p. 6, emphasis supplied).

Appellant does not appear to dispute the validity of these principles. Neither does it clearly identify any principle of law concerning the failing-company doctrine which this Court might expound on the facts of the present case. Appellant's quarrel seems simply to be with the respective relevance of the various undisputed financial facts presented to the District Court in this case.[9]

2. The undisputed basic facts solidly establish that HHM was a "failing company", well within the *International Shoe* doctrine, at the time of its acquisition by Diebold. A picture was presented of a long-term shortage of working capital during the fifties against a pattern of overexpansion of the business. When business contracted after 1957, there was generated a desperate "current" position in HHM's finances, which came to a head during 1959. This was attended by accounting and financial practices on HHM's part which were not, to put the matter delicately, in the usual course of trade.

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[9] Appellant raises, without arguing, the question whether the issues could properly be determined on motion for summary judgment. (J.S. 15). Where the basic facts are undisputed, as here, and where there is controversy only as to the inferences to be drawn from a mass of financial data, summary judgment would obviously be appropriate. Such a procedure was followed in *Associated Press* v. *United States*, 326 U.S. 1 (1945); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); and *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1 (1958), where the grant of a Government motion for summary judgment in antitrust proceedings was affirmed by this Court.

During the period in question, immediately before and at the time of the acquisition, HHM was clearly insolvent in the "equity" or "commercial" sense,[10] —"the company had reached the point where it could no longer pay its debts as they became due." *International Shoe,* 280 U.S., at 300.[11]

HHM's failing condition had various badges. It arbitrarily held up the payment of its trade accounts. It wrote checks against the "float" in its accounts. It was overdrawn frequently. It engaged in transfers to create fictitious balances. Its quick asset ratio indicated utter distress throughout this period. By the time of the acquisition, net quick assets were down to 3% of current liabilities, and the company had heavy overdue trade bills.

The fact that HHM was a "failing company" during this period, and the merit of the application of the doctrine here, are confirmed by the enormous amounts of cash, which clearly HHM could not have raised itself, pumped into it by Diebold immediately after the acquisition. This is further buttressed by the continued operating losses that continued to affect HHM after the acquisition. Clearly, if there had been no acquisition, on the date, September 11, 1959, when HHM was acquired, HHM's days would have been numbered.

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[10] This is the most common use of the term "insolvency". See MacLachlan, Bankruptcy (1956), § 13.

[11] This failure of a company through collapse of its current position during a time of business contraction was the very same type of business failure presented by the facts in *International Shoe*, in which the Court's conclusion was reached over a dissent which stressed the long-term prospects for the company. 280 U.S., at 306.

Appellant contends that the District Court reached its conclusion that HHM was a "failing company" on the basis of an "incomplete" picture of the company's "basic" financial position. (J.S. 4, 17). More simply stated, appellant is contending that the District Court erred in viewing as irrelevant and noncontrolling those details of HHM's finances which appellant submitted and relied on.

Appellant primarily objects to the District Court's conclusion that the long-term projections and historic balance sheet figures which it submitted were not controlling in view of the immediate financial crisis confronting HHM. But the financial crisis in which HHM found itself was not primarily related to its long-term prospects, but to its current position. The "long term" means nothing to a company which will not survive to enjoy it. The materials now stressed by appellant are simply not relevant to the central issue of fact—HHM's current position during the summer of 1959—on which decision in this case turned. If anything, the long-term figures offer an explanation of the background causes of the 1959 debacle—a long period of expansion, supported by inadequate working capital, followed by a cutback in sales, sudden, sharp increase of inventories, shortage of current funds, increased costs, and attendant insolvency.[12]

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[12] "Somewhat more difficult to see are potential dangers that arise when a business has too great a turnover of its working capital, when too large a volume of business is being supported by its working capital. The business may be very profitable, further obscuring any danger. It should be emphasized that when sales are supported by an inadequate working capital, the very delicate balance of incoming and outgoing funds that results is easily upset with any interruption in the flow of funds, such as the sudden loss of sales or poor collection performance." U. S. Department of Commerce, Guides for Business Analysis and Profit Evaluation (1959), p. 17.

Thus, the fact, stressed by appellant (J.S. 9), that HHM's sales steadily increased from 1950 through 1957 scarcely militates against the District Court's conclusion that HHM was unable to pay its bills in 1959. The condition of its "retained earnings" account, its profit and loss account, or the other non-asset accounts [13] relied on by appellant (J.S. 9), bears no relation to HHM's current position in 1959. The "basic" element in HHM's financial picture was that it had no money to pay its bills. Bills must ultimately be paid out of money in the bank, not out of accounting charge accounts like "earned surplus" and "profit and loss".

Again, the fact that HHM's return on investment amounted to an abstractly impressive percentage in the fiscal year ending June 30, 1959 (J.S. 9-10) is hardly significant in the light of the undisputed facts of HHM's financial plight before the closing in September, 1959.[14] Obviously a return on investment will be high in percentage terms where severe undercapitalization exists—until operating losses commence, as they did in the months before the acquisition, and current conditions become desperate.

Finally, the Government economist's affidavit comparing HHM's income tax and census reports with those of other corporations, and drawing conclusions as to their share of the market, basic soundness over the preceding five years, and the like (J.S. 10-11) has

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[13] Even if they be taken at face value, though made to order by the Treasurer on the President's request.

[14] Appellant's references to HHM's "effective use of its financial resources" (J.S. 10-11) are apparently simply to this high ratio between income and working capital during the period in which HHM was showing earnings.

no bearing on the practical current financial plight in which the company found itself in the summer of 1959. Old income tax reports, census reports, and the opinions of Government economists as to the "long view," with all due respect, are no substitute for cash in the bank to pay bills—and lack of the latter was HHM's problem.[15]

When all the facts are considered in perspective, it is clear that the District Court correctly concluded that the relevant, undisputed proofs established that HHM was a failing company in the relevant period in 1959, and hence within the *International Shoe* doctrine.[16] The financial details do not require further sifting in this Court.

3. Appellant suggests that this case might furnish an appropriate vehicle for this Court to respond to the

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[15] Appellant has suggested that the payment of a substantial sum for HHM's assets is inconsistent with its status as a failing company. (J.S. 18) This notion, of course, overlooks the facts as to Diebold's ignorance of HHM's true condition. And it might here be recalled that in *International Shoe* itself, as stated, note 11, *supra*, the acquired company had some long-term prospects, and stock worth $9,460,000 was given for it. 280 U.S., at 306. The point is that "long-term" prospects are irrelevant in the face of an immediate receivership, where the company may not survive to the "long term".

[16] Appellant stresses (J.S. 13, 18) that Diebold made some contract revisions favorable to HHM and Mosman personally, during the period when HHM was "*in extremis*", prompted by attempts by Mosman to get out of the contract. Since Diebold was ignorant of HHM's true financial condition, this may reflect favorably on Mosman's skill in negotiations, but it has no relevance to the question of the actual financial condition of HHM. Diebold has never contended that it consciously acquired HHM as a failing company. Under *International Shoe*, it is enough that the "effect" of the acquisition be one "of mitigating seriously injurious consequences otherwise probable," 280 U.S., at 302, that is, that the acquisition prevents the failure of a company in fact failing.

speculations of the commentators regarding the effect of the presence of alternative "bidders" on the *International Shoe* doctrine.[17] (J.S. 19-20). But this case hardly furnishes the raw materials for such an endeavor. The term "bidders" scarcely fits the figures involved here. No firm offer ever was made by any of them. Neither is there any evidence that any of these interests or promoters who actually even saw Mosman would have had available, or could have attracted, sufficient resources to close a purchase within the time the circumstances demanded. As to their contacts with HHM, Colonel Davis never took steps even to have the meeting the bank employee had promoted for him; Boyce obviously was thinking in unrealistic terms, clearly never brought matters to a head, and admits never having made a firm offer during the protracted period during which he had contacts with HHM; and Lovell's contacts never were seriously pursued by it in terms of negotiations; it does not even appear that it ever mentioned a starting figure.

To forecast that any of these figures, styled "promoters" by the District Court, would—or could—have been receptive to a quick sale of the sort that was clearly necessary under the circumstances, to contemplate how HHM's properties could have served as the collateral for the debt financing inevitably contemplated by these interests, or to imagine what the effect would have been if anything resembling full disclosure had been made by Mosman, is obviously to enter into the realm of speculation. Here the District Court realized,

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[17] Appellant's position appears to be merely that the existence of an alternative "prospective purchaser" or "bidder" would make the "failing company" doctrine only "not necessarily" available, and only that such an acquisition "may" be a violation. (J.S. 20).

as did the Court in *International Shoe*, that afterthought alternatives to the "outright sale," so clearly demanded under the circumstances, were matters where "one guess is as good as the other," and could be "dismissed as lying wholly within the realm of speculation." 280 U.S., at 301. No issue of law warranting further argument in this Court is tendered by these facts.

4. Finally, appellant, presumably in an effort to suggest that this case presents substantial issues which should occupy the time of this Court, catalogs a half-dozen § 7 cases in which the "failing company" doctrine was asserted by the defense (J.S. 21). The only lesson that can be derived from these decisions (none of which appellant claims to have enunciated any principle of law at variance with that applied below) is that the matter is one which turns on the particular facts of each case. Appellant's proclaimed fear of an undue broadening of the *International Shoe* doctrine by a pattern of factual adjudications should be more than allayed by the fact that, in the overwhelming majority of the cases it has listed [18]—including both the cases

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[18] In *Crown-Zellerbach Corp.* v. *FTC*, 1961 Trade Cas., ¶70,038 (9th Cir.) and in *Erie Sand & Gravel Co.* v. *FTC*, 291 F. 2d 279 (3d Cir. 1961), Courts of Appeals affirmed, on their facts, factual determinations by the FTC holding "failing company" status not proved. In *Farm Journal, Inc.*, 53 F.T.C. 26 (1956), and *Pillsbury Co.*, 1960-61 F.T.C. Cas., ¶29,277, the FTC also rejected "failing company" assertions on the facts. In *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 565 n. 44 (E.D. Pa. 1960), *aff'd*, 81 S. Ct. 755 (1961), the District Court expressed doubt whether such a status had been made out but found it unnecessary to decide the question. Only in *United States* v. *Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808-09 (D.D.C. 1958) was the existence of such a status found on the facts, and only as to some particulars of the charges. The Government's appeal in that case does not appear to have sought review of this particular finding. See 362 U.S. 458 (1960).

decided subsequently to the ruling below [19]—application of the doctrine was, on the facts presented, rejected.

CONCLUSION

The decision below represents the correct application of the settled doctrine of the *International Shoe* case to a set of undisputed basic facts. No question of law is raised, and the factual elements stressed by the appellant were duly considered and obviously do not detract from the conclusion reached by the District Court. Review in this Court of the District Court's findings concerning HHM's financial plight at the time of the acquisition patently is not attended by any public importance.

Accordingly, this motion to affirm should be granted.

Respectfully submitted,

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October 1961

---

[19] The *Crown-Zellerbach* and *Erie Sand & Gravel* cases.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, APPELLANT

v.

DIEBOLD, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

Diebold, in undertaking to foreclose full consideration of this appeal, asserts that the district court correctly concluded that Diebold's acquisition of HHM's assets fell within the "failing company" exception created in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, and that no further review is warranted by this Court. We believe the district court misconceived this Court's decision in *International Shoe.* In any event, the issue as to the scope of the exception is substantial and it is desirable that this Court clarify the boundaries of the doctrine.

617285—61

1. Diebold acknowledges that it paid a "substantial sum" for the assets of HHM (Motion, p. 21, n. 15), that it committed itself to the purchase notwithstanding its awareness of at least one significant inaccuracy in the HHM interim balance sheet upon which it relied in connection with the sale (*id.*, p. 11 n. 8), and that during the period when HHM was allegedly *in extremis* Diebold, prompted by the repeated efforts of Mosman, HHM's president, to get out of the contract, made contract revisions favorable to HHM and Mosman personally (*id.*, p. 21, n. 16). Diebold also does not dispute the government's data (J.S. 9–11) showing that in the fiscal year 1959, which was the year Diebold and HHM agreed on the basic terms of the sale,[1] HHM's net sales were the third highest in its history—just 6% below its peak in 1957; that, for the five fiscal years ending in 1959, HHM's net income after taxes ranged in round figures from $117,000 to $256,000 and that HHM's net income in 1959 of $188,000 was the second highest for the period; that HHM had paid dividends each year during that period; that in 1959 its working capital of over $1,300,000 was the highest in its history and its working capital ratio the third highest; that as of the end of the fiscal year 1959 HHM was free of long-term debt, having within the preceding two years completed payment of noncurrent bank loans as well

[1] An oral agreement for the sale of HHM's assets was reached by May 1959. In June, an Option (to which was attached an Agreement of Purchase and Sale) was signed. In July, the parties executed the Agreement and the closing took place on September 11, 1959. (Koontz Affidavit, pars. 5–18, filed September 1, 1959; Fdgs. 1–2, J.S. 23.

as of the mortgage on its land, building and equipment; that during fiscal 1959 it reduced its liability on notes and loans currently payable from over $700,000 to under $300,000; and that it enjoyed a good credit reputation.

Diebold argues that the district court was nevertheless correct in summarily dismissing the government's complaint and in viewing the data as to HHM's long-term financial picture as "irrelevant and noncontrolling" (Motion, p. 19). The relevant and central consideration, Diebold urges, was "HHM's current position during the summer of 1959" (*ibid.*). During this period, following "a long period of expansion" allegedly supported by "inadequate working capital," there was a "cutback in sales" and a "sudden, sharp increase of inventories" (*ibid.*).[2] Accordingly, HHM's cash assets were not sufficient to pay its bills as they became due (*id.*, pp. 18–21).

[2] What Diebold characterizes as a "cutback in sales" takes as its starting point sales made by HHM in its *peak* year, 1957, and apparently refers to the difference between sales of $10,670,000 made in that year and sales of $10,023,000 made in 1959, which was still its third best year (See J. S., p. 9). The "sudden, sharp increase of inventories" apparently refers to inventories which went from $1,833,652 in 1957 to $1,644,598 in 1958, to $1,906,342 in 1959 (Lybrand, Ross Report #2, Summary of Statements of Assets, filed in support of motion for summary judgment). Regarding "inadequate working capital," it should be noted that in the fiscal year 1959 HHM's working capital of over $1,300,000 was the highest in its history and its working capital ratio of 1.68 was barely exceeded only in 1951 and 1952 when the highest ratio of 1.70 was achieved (Singman Affidavit, Ex. 9, filed March 1, 1961).

Thus, the issue, even accepting the accuracy of Diebold's characterizations, is whether the "failing company" exception created in *International Shoe* extends to the acquisition of a company which is temporarily without sufficient cash to pay its bills as they become due, where there has been no showing that the company could not have raised the money and where the company was completely free of long-term debt, had a good credit reputation, and had a long record of good earnings and dividend payments.[3] This issue is substantial and it is highly desirable that this Court make a "firm declaration * * * emphasizing the narrow scope of the exception." Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 341–342. Otherwise, "in the ethos of the 'big antitrust case' * * *, the defense may be attempted even if the chances of success seem small * * * for even if business failure seems remote, evidence of financial weakness may tend somewhat to reduce the apparent

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[3] Also involved, as noted in our Jurisdictional Statement (pp. 4, 15, 20, 21), is the further question whether the underlying issues could properly be determined on motion for summary judgment. See *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624, 627; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256–257; 6 Moore's *Federal Practice* (2d ed.) par. 56.15[3]. Had the matter gone to trial, the government would not have been foreclosed from showing that, to a large extent, the deterioration in HHM's cash position came *after* HHM and Diebold had orally agreed in May 1959 on the basic terms of the agreement providing for Diebold's payment of $3,000,000 in cash and the assumption of HHM's liabilities (see n. 1, *supra*, p. 2), and that the subsequent weakening in HHM's account was not the result of any inherent weakness in the company's operating performance or financial condition.

significance of the disappearance of the acquired firm from the market." *Id.* at 341. (See also our Jurisdictional Statement 20–21.)

2. The ruling below permitted one of three dominant firms in the field to acquire the third largest firm.[4] It is obvious that the policies of Section 7 would have been better served by a sale to almost any other purchaser. The court, however, did not require a showing that reasonable efforts had been made to find another purchaser. It merely found that, of the three non-competing potential buyers who had expressed an interest in purchasing HHM, none had made a "firm" offer and that Diebold was the only firm willing to pay $3,000,000 in cash (Fdg. 26, J.S. 32). These facts alone did not justify the court's failure to explore more fully the price and terms which the potential buyers might have been willing to submit. For "the owner's desire to receive a high price [or only cash] is only one of several interests underlying the failing-firm defense," and the defendant's desire "to enhance his position in the market" may induce him to inflate his price. Bork, *supra,* 74 Harv. L. Rev. at 346. It is therefore

---

[4] Diebold characterizes as "pure assertion" (Motion, p. 2, n. 1) the government's allegations in its complaint (pars. 6–8) that Diebold and HHM were two of the three dominant firms in the relevant market. But the district court in summarily dismissing the complaint necessarily assumed that the government, if it had been allowed to go to trial, would have proved its allegations as to the positions of Diebold and HHM in the relevant market.

important that this Court should hold that, before the "failing company" defense is accepted, there must be a full inquiry into whether reasonable efforts have been made to find other buyers and into the price and terms upon which such other prospective buyers were interested in dealing.

Respectfully submitted.

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LEE LOEVINGER,
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OCTOBER 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

MOTION FILED DEC 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, *Appellant*,

v.

DIEBOLD, INCORPORATED, *Appellee*.

On Appeal from the United States District Court for the Southern District of Ohio

APPELLEE'S MOTION TO UNSEAL SEALED PAPERS AND MAKE THEM PART OF THE OPEN RECORD ON APPEAL, AND BRIEF IN SUPPORT THEREOF

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, *Appellant*,

v.

DIEBOLD, INCORPORATED, *Appellee*.

On Appeal from the United States District Court for the Southern District of Ohio

---

APPELLEE'S MOTION TO UNSEAL SEALED PAPERS AND MAKE THEM PART OF THE OPEN RECORD ON APPEAL

Diebold, Incorporated, appellee in this cause, moves the Court for an order authorizing and directing the Clerk of this Court to unseal and make part of the open record on appeal, available for use in the printed record if so designated by the parties, the affidavit of Albert Neisser, filed in the District Court on March

1, 1961, and all attachments thereto. These papers have been sealed by order of the District Court and are part of the certified record on appeal, though remaining under seal.

The grounds for this motion appear in the attached Brief.

Respectfully submitted,

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December 1961

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BRIEF IN SUPPORT OF APPELLEE'S MOTION TO UNSEAL SEALED PAPERS AND MAKE THEM PART OF THE OPEN RECORD ON APPEAL

STATEMENT

The complaint in this case alleged that the acquisition by Diebold, Incorporated (Diebold) of the assets of Herring-Hall-Marvin Safe Company (HHM) would substantially lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act. After extensive discovery had been had, Diebold moved for Summary Judgment, asserting that HHM was so hopelessly insolvent at the time of its acquisition that the acquisition could not violate Section 7. In opposition to Diebold's motion, the Government took depositions and filed affidavits which, under the Government's theory, were intended to show that HHM was not a "failing company"; rather, that its basic economic condition was sound.

One of the Government's affidavits, that of Albert Neisser, a Government economist, included a detailed comparison of the financial condition and operating performance of HHM and of two other companies, Diebold and Mosler Safe Company (Mosler), based in part on an examination of the income tax returns of those companies. Mosler, which is not a party to this litigation,[1] moved the District Court "to seal and suppress those portions [of the Neisser affidavit] . . . which disclose trade secret information obtained by the plaintiff from the original income tax returns filed by the Mosler Safe Company. . . ." (1st para. of the Order, attached hereto as Appendix A).

---

[1] Mosler is being duly served with a copy of this Motion, in view of its interest herein.

The District Court granted Diebold's motion for summary judgment on March 8, 1961. During the hearing on Diebold's Motion, the Court observed that "the Neisser affidavit is a part of the record and we are taking that into consideration in deciding this." (Transcript of Hearing, March 8, 1961, p. 10). At the hearing, however, the Court directed each party to turn over to the Clerk all copies of the affidavit and its attachments. Thereafter, on March 28, 1961, the Court entered the attached order in response to Mosler's motion. The order indicated that the Neisser affidavit and attachments had been duly considered, but ordered them, and all copies of them, sealed. The papers were transmitted under seal to the Clerk of this Court in connection with the Government's appeal herein. This Court has on November 6, 1961, noted probable jurisdiction of the United States' appeal from the judgment in Diebold's favor.

ARGUMENT

1. The sealed Neisser affidavit and attachments include material which is relevant to the issues on appeal. As the record plainly indicates, this material was considered by the District Court in deciding the case below. It is, therefore, clearly necessary that it be part of the open record on appeal before this Court. Before the public interest in the publicity of evidence in antitrust matters, the interest of private parties in so-called "trade secrets" must yield, as numerous decisions establish. See *Service Liquor Distributors* v. *Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D. N.Y., 1954); *United States* v. *Lever Bros. Co.*, 193 F. Supp. 254 (S.D. N.Y., 1961); *H. P. Hood & Sons, Inc.*, Dkt. 7709, F.T.C., March 14, 1961, 1960-61 CCH FTC Cas. ¶29,461; cf. Publicity in Taking Evidence Act, Act of

March 3, 1913, 37 Stat. 731, 15 U.S.C. §30; *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

The relevance of the papers in question to the issues on appeal is confirmed by the fact that the Government has designated most of them in its Designation for Printing.[2] See Item 21. And the lack of any basis for keeping them *in camera*, as opposed to the public interest in making public these relevant documents in an antitrust proceeding is underscored by the fact that the authorities cited by Mosler to the District Court in support of secrecy—Sections 6103 and 7213 of the Internal Revenue Code, and Treasury Regulations 301.6103—actually allow publication of the documents here. Section 6103(a)(2) allows income tax returns to be open to examination "to such extent as shall be authorized in rules and regulations promulgated by the President," and Regulations 301.6103(h) permit their use in litigation "if the United States is interested in the result."

2. No alternative form of dealing with the sealed material other than making it completely part of the public record will suffice to enable this case to be properly briefed and argued. The case involves a review of the factual basis on which the District Court concluded that HHM was so hopelessly insolvent at the time of its acquisition by Diebold that the acquisition could not violate Section 7. The United States has made reference to the affidavit in its Jurisdictional Statement (page 11), and more detailed references will doubtless have to be made in the briefs and in oral argument, when the District Court's findings and con-

[2] The Government's Designation refers to a Motion to be made to unseal the papers in question.

clusions are reviewed on the merits. Any device that would require references of this sort to be made "*in camera*" would be grossly awkward and inconvenient for the parties and the Court.

CONCLUSION

For the reasons stated, Diebold's Motion to unseal the sealed papers in question, and make them part of the open record in this cause, fully available for printing as part of the printed record if designated, should be granted.

Respectfully submitted,

December 1961

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APPENDIX A

[Caption Omitted]

Order

The Mosler Safe Company having moved this Court by a Notice of Motion dated March 3, 1961, to seal and suppress those portions of an affidavit filed by the Plaintiff in this matter (Neisser affidavit) which disclose trade secret information obtained by the Plaintiff from the original income tax returns filed by the Mosler Safe Company, and said motion having duly come on to be heard before this Court on March 8, 1961.

Now, upon reading and filing the Notice of Motion dated March 3, 1961 and the affidavit of Edgar E. Barton dated March 3, 1961, together with proof of due service thereof, in support of said motion; and having read and considered the said affidavit filed by Plaintiff (Neisser affidavit); and oral argument having been heard thereon; and counsel for defendants having orally stipulated that the portions of the said affidavit relating to Mosler Safe Company will not be disclosed to their clients or to the public pending further order of this Court; it is

ORDERED that said motion to seal the affidavit filed by Plaintiff (Neisser affidavit) is granted pending further order of this Court; and it is further

ORDERED that the said affidavit filed by Plaintiff (Neisser affidavit) be detached from the file and sealed by the Clerk of this Court together with the copies of the said affidavit and supporting schedules turned over to the Clerk by the parties to the action, pending further order of this Court.

Dated: Cincinnati, Ohio

March 28, 1961.

/s/ JOHN H. DRUFFEL
United States District Judge

Certificate of Service

I hereby certify that the above Motion and Supporting Brief was this day served (1) on the United States, appellant herein, by depositing copies thereof in a United States mailbox postage prepaid duly addressed to the Solicitor General, Department of Justice, Washington 25, D. C., and (2) on the Mosler Safe Company, whose interests are affected thereby, by depositing copies thereof in a United States mailbox postage prepaid duly addressed to counsel for the Mosler Safe Company, Edgar E. Barton, Esquire, White & Case, 14 Wall Street, New York 5, New York.

Dated: this day of , 1961

WILLIAM L. MCGOVERN
Of Counsel for Appellee

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, APPELLANT

v.

DIEBOLD, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO APPELLEE'S MOTION TO UNSEAL SEALED PAPERS AND MAKE THEM PART OF THE OPEN RECORD ON APPEAL

The United States agrees with appellee that the Neisser affidavit and attachments, which the district court ordered sealed, include material which is relevant to the issues on appeal and that this material was considered by the district court in deciding the case. The United States therefore has no objection to the motion to unseal the sealed papers and make them part of the open record on appeal.

However, at this posture of the case, when counsel for the parties are designating the record for print-

ing—and before the arguments in this Court have been fully projected—no one knows with certainty whether or not it will be necessary to rely on all those portions of the sealed papers which the Mosler Safe Company has wished to keep from public disclosure.[1] Accordingly, if Mosler still objects to disclosure, we suggest the following alternative method of preventing or minimizing unnecessary disclosure:

1. The Clerk will not at this time print any portion of the sealed papers.

2. Counsel for the parties shall have unrestricted access to the papers in the Clerk's office.

3. Where counsel deem it necessary, they shall be free to refer in briefs (or in oral argument) to any material included in the sealed papers.

4. Within 5 days after appellee's brief is received by appellant, the parties shall designate the portions of the sealed papers they wish to have printed as part of the record and the Clerk shall immediately cause those portions to be printed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1961

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[1] Although the Mosler Safe Company is not a party to this litigation, it is being served with a copy of this memorandum (see the Motion, p. 3, n. 1).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 621908 689

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Supreme Court of the United States

No. 286

UNITED STATES OF AMERICA,
Appellant,

against

DIEBOLD, INCORPORATED,
Appellee.

On Appeal from the United States District Court for the Southern District of Ohio

BRIEF OF MOSLER SAFE COMPANY IN OPPOSITION TO APPELLEE'S MOTION TO UNSEAL SEALED PAPERS

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Supreme Court of the United States

No. 286

UNITED STATES OF AMERICA,

Appellant,

against

DIEBOLD, INCORPORATED,

Appellee.

On Appeal from the United States District Court for the Southern District of Ohio

BRIEF OF MOSLER SAFE COMPANY IN OPPOSITION TO APPELLEE'S MOTION TO UNSEAL SEALED PAPERS

Appellee, Diebold, Incorporated (Diebold) has moved this Court by notice dated November 30, 1961, for an order "authorizing and directing the Clerk of this Court to unseal and make part of the open record on appeal, available for use in the printed record if so designated by the parties, the affidavit of Albert Neisser, filed in the District Court on March 1, 1961, and all attachments thereto."

The affidavit of Albert Neisser referred to in Diebold's motion was filed on behalf of the plaintiff United States in this action and was ordered sealed by the trial court on motion of the Mosler Safe Company (Mosler) on the ground that the affidavit contained and disclosed extremely valuable trade secret information concerning Mosler which had been obtained by agents of the plaintiff from the original income tax returns filed by Mosler. The Neisser affidavit even went so far as to annex a photocopy of Mosler's 1959 income tax return.

The Mosler Safe Company is, of course, not a party in this action, and is not associated with the defendant Diebold. Instead, quite to the contrary, Mosler is actively engaged in competition against the defendant Diebold.

No showing of any necessity for the public disclosure of Mosler's income tax returns and other confidential financial information has ever been made by either of the parties to this litigation.

Argument

The brief of the defendant Diebold on the present motion fails completely to demonstrate any necessity or requirement on this appeal for this disclosure of Mosler's confidential income tax returns and other intimate trade and business secrets to its major competitor, Diebold.

None of the cases cited by Diebold at pages 4 and 5 of its brief involves situations which are at all comparable to the present situation.

Neither the case of *Service Liquor Distributors* v. *Calvert Distributors Corp.*, 16 FRD 507, 509 (SDNY 1954), ner the case of *H. P. Hood & Sons Inc.*, FTC Dkt. 7709, CCH Trade Reg. Rep. ¶29,461 (Transfer Binder 1960-61), involves in any way an attempt to force the disclosure of confidential income tax returns or other trade secret information belonging to a mere witness or other third person or corporation which is not a party to the litigation; both of the cited cases deal only with the necessary disclosure of information belonging to an actual party to the litigation.

The "Publicity in Taking Evidence Act" (15 USC §30) cited by the appellee Diebold is concerned solely with procedure in the taking of depositions and is obviously inapplicable to the disclosure of Mosler's confidential income tax returns sought by Diebold on this motion. Similarly, the case of *U. S.* v. *Procter & Gamble Co.*, 356 U. S. 677, 683 (1958) is concerned solely with preserving the traditional secrecy of grand jury minutes and does not support Diebold's present motion in any respect.

Judge Kaufman's ruling in *U. S.* v. *Lever Bros. Co and Monsanto Chemical Co.*, 193 F. Supp. 254 (SDNY 1961) bears only a superficial resemblance to the present case, and is neither applicable nor controlling in the present situation. The basic market information sought by Lever Bros. from its competitors Procter & Gamble and Colgate had already been disclosed by them to the plaintiff in the action, and this information was expressly found by the court to be absolutely essential to a determination on the merits of the crucial isses of "delineation of the relevant market and the determination of whether the sale of assets

in question may result in the requisite substantial lessening of competition" (195 F. Supp. at 256).

There is obviously no such necessity for the disclosure of Mosler's confidential financial data in the present case in order to reach a decision on the merits of this appeal, since the decision of the District Court in this case was expressly limited solely to a finding that the acquired company, Herring-Hall-Marvin Safe Company (HHM), was a "failing company" within the meaning of *International Shoe* v. *U. S.*, 280 U. S. 291 (1930).

Under these circumstances, it is abundantly clear that there is no necessity whatsoever for requiring the disclosure of Mosler's confidential income tax returns to its chief competitor Diebold.

It should furthermore be noted that even in the *Lever Bros.* case referred to above, Judge Kaufman expressly ruled that a protective order should be entered with respect to the information which was required for that case:

> "While I, therefore, hold that Lever is entitled to full discovery, this privilege should in fairness to all concerned be exercised in a manner which will not hamper its ability to prepare its defense, and at the same time will operate to discourage any improper and unfair use of the material to be produced. I am of the opinion that in the context of this case, a proper protective order can be framed to accomplish these objectives. Thus, while I conclude that Procter is not entitled to the rigid type of protection it seeks, *in order to assure* that *Lever will not use this data for an improper competitive purpose, the information is not to be disclosed*

to Lever's personnel, except insofar as it may be necessary for consultation with counsel for Lever in order to prepare for and assist in the defense of the action. Any such personnel obtaining access to the information for this purpose shall not make copies, or reveal the contents of the documents, or use the information for any purpose other than for the preparation and defense of this action. Of course, at this stage, *none of this data*, including the information contained in the reports made by the A. C. Nielsen Co., *is to be disclosed to the public.*" (195 F. Supp. at 258; emphasis added.)

Similarly, Sections 6103 and 7213 of the Internal Revenue Code and Treasury Regulation Section 301.6103 make it crystal clear that confidential income tax returns can be disclosed or made public in only the most exceptional cases. Thus, Treasury Regulation Section 301.6103(h) provides in pertinent part:

"* * * The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. * * * If a return, or copy thereof, is furnished pursuant to this paragraph, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity *necessarily* results from such use. * * *" (Emphasis added.)

As previously noted, no showing of any necessity for the public disclosure of Mosler's income tax returns and other confidential financial information has ever been made by either of the parties to this litigation.

A protective order was also entered by Judge Bicks in the *Service Liquor Distributors* v. *Calvert Distributors Corp.* litigation, 16 FRD 513, 514 (SDNY 1955), even though the plaintiff was seeking to inspect the books of one of the defendants in the action.

The appellee Diebold's present motion is also clearly premature since Diebold itself does not purport to rely in any way on this appeal upon the appellant's Neisser affidavit or upon any of the data contained therein, and similarly, the Solicitor General has indicated that it also may very well be unnecessary for the United States to rely upon the portions of the Neisser affidavit which disclose Mosler's trade secret information. Thus, the Memorandum for the United States on this motion states in pertinent part that:

> "• • • at this posture of the case, when counsel for the parties are designating the record for printing—and before the arguments in this Court have been fully projected—*no one knows with certainty whether or not it will be necessary to rely on all those portions of the sealed papers which the Mosler Safe Company has wished to keep from public disclosure.*" (Emphasis added.)

The extremely limited nature of the use which was made in the Neisser affidavit of the confidential information taken from Mosler's income tax returns is succinctly illustrated by the following quotation from the appellant's Jurisdictional Statement filed August 4, 1961 (at pp. 10-11):

> "Based on an examination of the federal income tax returns of the three major companies in the field (HHM, Diebold and the Mosler Safe Company) for the five-year period preceding the merger, a government

> economist compared their financial strength and operating performance. Applying criteria customarily used by accountants and economists (such as the relationship between net income and net sales, net income and net worth, net sales and working capital, net sales and inventory, etc.), he concluded that HHM, compared to the other two companies, was in sound financial condition and made effective use of its financial resources."

In this respect, it should be noted that the government economist (Neisser) also made similar comparisons utilizing published financial information of publicly owned companies such as Continental Can, American Radiator & Standard Sanitary, Gillette Co., Murray Corporation of America, Crane and Briggs "which are included in the 'industry' according to Lybrand" (Plaintiff's Memorandum in District Court). Obviously the comparisons between HHM and these publicly-owned companies, plus the comparison of HHM with Diebold itself, are completely adequate for the plaintiff's purposes on the appeal. Any comparison utilizing privately-owned Mosler's confidential tax returns is clearly unnecessary and would at most be merely cumulative.

Mosler has, of course, no objection to unsealing those portions of the Neisser affidavit which do not reveal information taken from Mosler's confidential income tax returns.

Similarly, Mosler does not object to any use which may be made of the sales figures which Mosler has made available to the parties during its examination before trial as a witness in this case.

It would indeed be ironic if the defendant Diebold's acquisition of HHM, which the United States has alleged:

> "will enhance Diebold's competitive advantage over smaller producers to the detriment of competition"
>
> and will
>
> "tend to create a monopoly" [Complaint ¶11]

should also have the practical outcome as a result of the government's Complaint and of the present motion, of permitting Diebold to acquire the further important competitive advantage of examining and studying the confidential business and financial records and trade secrets of the only remaining "smaller producer"—Mosler.

Conclusion

For the reasons set forth above, Diebold's Motion to unseal the sealed papers in question, and to make them part of the open record in this cause fully available for printing as part of the printed record if so designated by the parties, should be denied insofar as the said Motion relates to the confidential income tax returns of Mosler Safe Company and to information taken from the confidential income tax returns of Mosler Safe Company. Mosler is, however, willing to cooperate fully with the Solicitor General and with counsel for Diebold with respect to any necessary use by counsel—upon as limited a basis as is practical—of such

information as may actually be necessary for the presentation or defense of the appeal in this case.

December 15, 1961.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, APPELLANT

v.

DIEBOLD, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion in granting appellee's motion for summary judgment.

JURISDICTION

The United States brought this action against Diebold, Incorporated and Herring-Hall-Marvin Safe Company under Section 15 of the Clayton Act, 15 U.S.C. 25, alleging a violation of Section 7 of that Act. On March 8, 1961, the district court entered a judgment (R. 561) granting Diebold's motion for summary judgment, and on June 23, 1961 the court, on motion of the United States, entered an order dismissing the complaint against Herring-Hall-Marvin

Safe Company (R. 594). Notice of appeal was filed on July 3, 1961 (R. 595), and this Court noted probable jurisdiction on November 6, 1961 (R. 597; 368 U.S. 894).[1] The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C 29.

STATUTE INVOLVED

The first paragraph of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, provides as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

QUESTIONS PRESENTED

In a suit challenging a corporate asset acquisition under Section 7 of the Clayton Act, the district court granted defendant-appellee's motion for summary

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[1] The government had filed a notice of appeal from the earlier judgment on May 5, 1961. The second notice of appeal was filed to guard against the claim that the earlier notice of appeal was premature, since as of that date the action was still pending against Herring-Hall-Marvin. See 6 Moore's Federal Practice (2d ed.), par. 54.34[2].

judgment. The court held that the acquired firm was a "failing company" under the standard enunciated in *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, and that its acquisition accordingly did not threaten or cause a lessening of competition. The following questions are presented:

1. Whether the district court erred in accepting the "failing company" defense where the uncontradicted evidence established that (a) the acquired company had consistently operated at a profit, paid dividends, enjoyed an increasing share of the market, and steadily improved its basic financial condition, and (b) there were other potential purchasers, not in competition with the acquired company, which had expressed an active interest in acquiring it, and where there was no showing that sale of the company was the only real alternative to its going out of business.

2. Whether, in any event, the district court improperly granted appellee's motion for summary judgment.

STATEMENT

This is a civil antitrust suit by the United States challenging a corporate asset acquisition as violating Section 7 of the Clayton Act. The district court, without ever considering the effect of the acquisition on competition, dismissed the case on the ground that the acquired firm was a "failing company" under the doctrine of *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, and that the acquisition of its assets by a competitor was therefore beyond the reach of the statute.

On August 24, 1959, the United States filed a complaint (R. 1–4) against appellee Diebold, Incorporated ("Diebold") and Herring-Hall-Marvin Safe Company ("HHM"). It alleged that Diebold and HHM manufacture bank vault and related products, and are two of the only three firms in the United States which manufacture and sell bank vaults and bank vault doors; that on July 17, 1959 the two companies had entered into an agreement for the sale of HHM's assets to Diebold; and that the effect of carrying out the agreement may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of such products, in violation of Section 7 of the Clayton Act.

The government simultaneously filed a motion for a preliminary injunction to prevent consummation of the acquisition pending determination of the merits of the complaint (R. 5). In opposition, Diebold filed the affidavit of Raymond Koontz, its president (R. 6–25). Koontz did not assert that the financial condition of HHM was poor. His principal contention was that Diebold had made a favorable purchase and would lose its benefits if the injunction were granted. He also contended that both the suit and the request for an injunction were instigated by the president of HHM, in order to avoid HHM's obligations under the contract of sale (R. 6–14, pars. 1–30).[2]

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[2] The contract provided that it would automatically terminate if its performance should be prevented by an injunction for longer than 120 days from July 17, 1959, unless extended by the parties for an additional 120 days (R. 14, par. 29).

The district judge denied the government's motion for a preliminary injunction (R. 144) and on September 11, 1959, the sale was consummated (R. 190). On September 16, 1959, Diebold filed its answer which denied the allegations of the complaint but made no reference to the financial condition of HHM (R. 158).

The first time that Diebold alluded to HHM's financial difficulties was many months later. On November 18, 1960, the government filed a motion for an order to require Diebold to give 60 days' notice of any contemplated disposition of the principal assets it had acquired from HHM (R. 170–171). The motion stated that it was filed because Diebold had informed the government that it contemplated closing the existing HHM sales offices. During the hearing on the motion (held on the same day), Diebold's counsel stated that after the sale Diebold discovered that HHM was losing money, and that "within one month we were left with a company that was in the gravest financial straits" (R. 191); and that, because of that condition and the loss of a number of key HHM salesmen to the Mosler Safe Company, Diebold had decided to relocate the remaining HHM salesmen in the Diebold offices. The district court observed that HHM was a "defunct organization" and "practically bankrupt when it was merged" (R. 199, 204). The court also stated (R. 200) that "this suit has been pending too long now," that "the government should have come in and agreed to a consent entry of some kind to terminate it" (*ibid.*, see R. 203, 205, 206); and that "when the Administrative

Office [of the United States Courts] is on our back wanting to know why this case is pending so long * * * it seems to me that there is a lot of affairs going on in the United States regarding mergers that are a lot more important than this is" (R. 202).[3]

DIEBOLD'S MOTION FOR SUMMARY JUDGMENT

On January 19, 1961, Diebold moved for summary judgment (R. 222). Citing *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, it argued that Section 7 was inapplicable to a "failing company," and that the undisputed facts showed "HHM was obviously a firm *in extremis*" on the settlement date (September 11, 1959) and "could not possibly have long survived" (Unprinted Diebold Memorandum in Support of Motion for Summary Judgment, p. 15). In support of this position, Diebold filed affidavits of its president (R. 262–265), its vice-president (R. 552–560) and the president of HHM (R. 265–268); special audit reports of a certified public accountant (R. 227–257); and a report of a firm of consulting engineers (R. 259–262).

As set forth in its memorandum in support of the motion and its proposed findings of fact, Diebold sought to establish the following:

1. From June 1950 to September 1959, HHM had been short of working capital (current assets minus

[3] The district court apparently regarded the government's motion for 60 days' notice as another "request for a temporary injunction" (R. 205) and did not act on it.

current liabilities) and for the years 1951 through 1959 its working capital ratio (relationship between current assets and current liabilities) averaged only 1.5 in contrast with an average of 2.7 for all manufacturers of fabricated metal products.

2. From June 1950 through 1958, HHM's liabilities exceeded its tangible net worth.

3. HHM's net sales were $10,672,000 in 1956–1957, but decreased by approximately $300,000 in each of the two following years (fiscal 1958 and fiscal 1959); inventories increased in fiscal 1959 by $262,000.

4. The company was short of cash and frequently overdrawn on its bank accounts between April 1959 and September 1959. During the summer of 1959 it did not have sufficient cash to pay its bills as they became due.

5. Between July 1, 1959 and September 17, 1959 (the day before settlement), HHM sustained operating losses exceeding $206,000.

6. In September, 1959, soon after the closing, Diebold advanced $500,000 in cash to meet past and currently due trade obligations of HHM.

7. In the spring of 1959, the HHM union presented HHM with "excessive demands" to which HHM had to yield. Because of this, the president of HHM "gave serious consideration" to recommending to the Board of Directors that HHM be liquidated (R. 267).

8. In the opinion of certain consulting engineers, HHM was a high-cost producer which could exist only as a marginal operation and which could probably not survive in a highly competitive market.

9. Following the acquisition, orders placed with the HHM Division of Diebold declined. This resulted in employee lay-offs; 294 of the 664 HHM employees were dropped from the payroll within less than a year and a half after the acquisition.

THE GOVERNMENT'S SHOWING IN OPPOSITION

In opposition to the motion for summary judgment, the government presented substantial factual information [4] to show that HHM was not facing imminent financial collapse; that its basic economic condition was sound; that the long-term financial picture of the company was that of almost uninterrupted improvement; that its financial situation during its last full fiscal year of operation prior to the closing showed a vigorous and flourishing enterprise; that the company's financial condition and operating performance were good compared to the other major firms in the industry; and that, in light of the company's increasing share of the market, future prospects were favorable. The government also presented material showing that HHM enjoyed a favorable credit standing; that Diebold had paid a premium price for HHM's

[4] The government's opposition was based chiefly on the affidavits of a government accountant and a government economist and supporting documents which included the published financial statements of HHM, the respective federal income tax returns, for the five years preceding the merger, of HHM, Diebold and the Mosler Safe Company (a competitor in the bank vault equipment market), the special audit reports filed by Diebold in support of the motion, credit reports on HHM, and census reports of HHM and for the bank vault equipment industry in general.

assets; that the conduct of the parties long before the "failing company" defense was first asserted was inconsistent with the claim that HHM was on the brink of financial disaster; and that, although Diebold may have been the only purchaser willing to agree to the terms and price at which the sale was made, there were other prospective purchasers interested in acquiring HHM at a reasonable price. We summarize below the material presented by the government in support of these contentions.

A. *HHM's long-term financial picture.* Data based on HHM's published financial statements and on the special audit reports filed in support of Diebold's motion show the following:

1. During the fifteen years preceeding the acquisition in 1959, HHM's net sales rose from $1,157,967 in 1944 to $5,023,270 in 1949, to $6,898,633 in 1954 and to $10,672,279 in 1957. Although sales dropped approximately $300,000 in fiscal 1958 and another $300,000 in fiscal 1959, net sales in each of these years still exceeded $10,000,000 (R. 337).

2. The company's working capital progressively improved from a minus position of $167,305 in 1944 to a favorable balance of $217,538 in 1949, $547,143 in 1954 and $1,317,755, the highest in its history, in 1959 (R. 340). Although its working capital ratio averaged about 1.5 for the years 1951 through 1959, the ratio showed almost uninterrupted improvement from 1944 to 1959; and the ratio of 1.68 in 1959 was its best

except for 1951 and 1952 when 1.70 was achieved (*ibid.*).[5]

3. Its retained earnings account increased from a deficit position of $385,144 in 1944 to a favorable position of $787,617 in 1950, to $1,254,616 in 1954, and to $2,247,987 in 1959 (R. 339).

4. During fiscal 1959 HHM reduced its liability on notes and loans payable from more than $700,000 to less than $300,000; it had no long-term debt as of June 30, 1959; and the mortgage on its land, building and equipment which amounted to almost $325,000 as of June 30, 1955, was paid off by June 30, 1958 (R. 331, par. A6; R. 600, 605).

5. In the fiscal years 1955 through 1959, HHM's net income after taxes ranged from $116,924.41 (1955) to $256,415.61 (1956); in 1957, 1958 and 1959, it was repectively $181,710.81, $185,776.52 and $187,602.73 (R. 331, par. A1; R. 334, Table 1). The average annual return on investment for this period was in excess of 11 percent after taxes. For the fiscal year 1959, it

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[5] One of the special audit reports filed in support of Diebold's motion for summary judgment was a comparison of HHM's "current" or "working capital" ratio and also its "quick ratio" with those of the metal fabricating industry (R. 253–256; (See Fdg. 6, R. 563)). The government's economist challenged the validity of (a) comparing such ratios between a manufacturer of bank vault equipment and a group composed of a great many heterogeneous types of companies (none well known in the bank vault equipment field) and (b) using such ratios rather than a large number of more meaningful relationships, as an indicator of a company's solvency (R. 601–604, pars. 7–8). The report's "quick ratio" figures (R. 256; Fdg. 6, R. 563) were also challenged because they were made without regard to the company's receivables (R. 333, par. B6).

was 19.6 percent before taxes and 8.98 percent after taxes (*ibid.*).

6. The company paid dividends of $2.00 a share (on its approximately 5,900 outstanding shares) for each of the five fiscal years 1955 through 1959 (R. 331, par. A3; R. 334, Table 3).

7. Although HHM's liabilities exceeded its tangible net worth from 1950 through 1958, the gap between the two consistently narrowed until in 1958 tangible net worth was about equal to total liabilities (non-current as well as current). In 1959, tangible net worth was $2,313,441 compared with total liabilities of $1,930,742 (R. 243).

8. During the period from 1950 to 1959, while the company's annual average sales volume approximately doubled, the ratio of the company's cost of sales and selling and administrative expenses to net sales remained about the same (R. 332, par. B1; R. 337). During this same period, the company's inventory turnover improved considerably, averaging an approximate turnover of once every 69 days as contrasted with a turnover of once every 98 days in the earlier period from 1944 to 1950 (R. 332, par. B5; R. 342).

B. *HHM's financial picture during its last full fiscal year prior to the closing.* HHM's last full fiscal year of operations prior to the closing date of the sale ended on June 30, 1959. Data for this year, based on HHM's published financial statement and on the special audit reports filed in support of Diebold's motion, show the following:

HHM's net sales, although declining about 3 percent, were the third highest in its history (R. 337). Its working capital was the highest in its history (R. 334, Table 5; R. 340). The company's income of $409,403 before taxes and $187,602 after taxes represented a return on investment before and after taxes, respectively, of 19.6 percent and 8.98 percent (R. 334, Table 1; R. 337). The company paid its usual $2 dividend per share (R. 334, Table 3). Its retained earnings account was the highest in its history (R. 334, Table 2; R. 339). HHM reduced its liability on notes and loans payable by more than half, from more than $700,000 to less than $300,000, and had no long-term debt (R. 331, par. A6; R. 335). Its tangible net worth exceeded its total liabilities by more than $380,000 (R. 334) and, according to the company's certified financial statement, its inventory increased only about $103,000 (R. 335, Table 6).[6]

Data based on an examination of the federal income tax returns of the three major companies in the field (HHM, Diebold and the Mosler Safe Company) showed that in 1959 HHM made relatively greater improvements in its financial condition and more effective use of its resources than did Mosler; and that in some respects HHM did better than Diebold and in others not as well (see *infra*, pp. 14–16).

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[6] According to the special audit report prepared by Lybrand, Ross Bros. & Montgomery, the accounting firm which also certified HHM's financial statement (see unprinted Ex. 5 to Singman affidavit), HHM's inventory increased by $262,000 in fiscal 1959 (R. 239).

During the eight full months in 1959 preceding the closing, HHM's minimum bank balances at its principal depositary ranged from $6,143 to $142,586, and averaged over $60,000 a month (R. 437–438).[7] According to the government's economist, HHM's cash position was not critical, since a company, such as HHM, whose main customers were the federal government and the nation's banks, has less need to maintain large cash balances than a company which has a large number of small customers (R. 601, par. 6; R. 603).

The company's bank accounts were never overdrawn, but always had sufficient funds to cover any check actually presented for payment (R. 406–410).[8] According to the special audit report submitted by Diebold, HHM "followed the procedure of preparing checks in payment of invoices at the time invoices were approved, but of not releasing them until later." (R. 227–228). The government contended that these checks, even though not released to the payee until a later date (as well as those released but not yet presented for payment), were reflected on the company's own books as debits against its bank accounts as of the date drawn;

[7] The material submitted by the government relating to HHM's principal bank account was limited by the court, upon Diebold's motion, to the period in 1959 preceding the closing (R. 301–303, 311–312).

[8] Diebold has not contended that HHM's accounts with its banks other than its principal depositary (The First National Bank and Trust Co. of Hamilton) were ever overdrawn. The special audit report submitted by Diebold shows that these accounts were not overdrawn (R. 233).

and hence that the company's accounts may be said to have been "overdrawn" only if such checks are treated as though they had actually been presented for payment on the dates drawn and then only on certain dates, almost all of which were after an agreement for the sale of HHM's assets had been reached.[9]

C. *Comparison of HHM's financial strength and operating performance with those of Diebold and Mosler Safe Company.* Based on an examination of the federal income tax returns of HHM, Diebold and the Mosler Safe Company for the five-year period preceding the merger, the government economist (Albert C. Neisser) made a detailed comparison of the financial strength and operating performance of the three companies.[10] He concluded that an analysis of a large

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[9] Except for a few days at the end of 1958 and in April, 1959, the "overdrafts" on HHM's total bank balances occurred between May and September 1959 (R. 553). An oral agreement for the sale of HHM's assets was reached by May 1959. In June, an option (to which was attached an agreement of purchase and sale) was signed. In July, the parties executed the agreement and the closing took place on September 11, 1959. (R. 7–10, 561–562).

[10] After granting the motion for summary judgment, the district court, on the motion of the Mosler Safe Company, ordered the sealing of Neisser's affidavit and the attachments thereto (R. 571–572, 592–593). The material was transmitted to this Court under seal. After this Court noted probable jurisdiction, Diebold filed a motion to unseal the material and to make it part of the open record on appeal. Mosler originally opposed the motion. It subsequently withdrew its objection to the printing of specified portions of the material, and also authorized any party to include in its brief "any material which may be reasonably necessary in the light of the arguments in the case * * *." (See letter to the Clerk, dated February 2, 1962, from White & Case, counsel for Mosler). Por-

number of relationships between various items shown on the balance sheets and income statements (such as the relationship between net income and net sales, net income and net worth, net sales and working capital, net sales and inventory, etc.), showed that HHM, as compared to the other two companies, had been in sound financial condition before the merger and that it had made effective use of its financial resources (R. 600, 604–605).

Specific examples of what the analysis showed are as follows: (1) From 1955 to 1959, HHM increased its return (net income) on net sales from 1.29 percent to 4.73 percent, while Diebold's return increased only from 6.64 percent to 10.81 percent and Mosler's declined from 7.99 to 2.07 percent (Neisser Affidavit, p. 8, par. 9); (2) HHM's return on tangible net worth (capital stock, paid in surplus, earned surplus and undivided profits) was 6½ percent in 1955 and more than 20 percent in each of the four succeeding years; Diebold returned about 25 percent in 1955 and about 35 percent for the next four years; Mosler's return on equity fell from 16.35 percent in 1955 to 4 percent in 1959 (*id.*, p. 8, par. 12); (3) although HHM had a narrow working capital basis, it was able to obtain more than twice as many sales per dollar of available working capital as either Mosler or Diebold for each of the five years preceding the acquisition (*id.*, p. 11, par. 20); (4) HHM's working capital had doubled between

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tions of the affidavit and the supporting documents are printed at R. 599–638. Those portions which have not been printed will be referred to as "Neisser Affidavit."

1955 and 1959, rising from $649,000 to $1,354,000, while Diebold's increased only from $5,415,000 to $7,882,000 and Mosler's only from $6,169,000 to $7,098,000 (*id.*, p. 10, par. 17; Appendix: Table 7); and (5) although in fiscal 1959 HHM showed a profit of $36 for every hundred dollars of working capital and Diebold showed a profit of $41, Mosler's profit was less than $6 (*ibid.*).

D. *HHM's increasing share of the market.* A comparison of reports filed with the Census Bureau showed, with respect to key products, that from 1954 to 1958 (the years for which reports were available), HHM's rate of increase in sales was greater than that for all producers of such products, taken as a whole, and that HHM increased its share of the market (R. 600–601, par. 4; 607–613, 621–638).

E. *HHM's credit standing.* Dun and Bradstreet, Inc., in July and September, 1959, rated HHM "AA" for financial strength and gave it a composite credit appraisal of "A1" (R. 600, par. 4; R. 605, par. 29). HHM's principal bank depositary extended loans to HHM without requiring security or collateral and charged interest of only one-half to one percent above the prime rate (R. 459, 462).

F. *The price paid.* In exchange for the assets of HHM (which were carried on HHM's balance sheet at approximately $4,000,000), Diebold paid $3,000,000 in cash and assumed HHM's liabilities (R. 381–382) of approximately $1,800,000 (R. 389, 557). In addition, Diebold agreed to employ Mosman, HHM's president, for nine years, at $50,000 a year for the first

five years and $25,000 a year for the remaining four years (R. 96, 391–395).

G. *The statements and conduct of the parties as they bear on the theory that the sale was made to avoid financial disaster.*—Long before the "failing company" defense was asserted, officials of HHM and Diebold had filed affidavits describing the circumstances surrounding the sale. The government contended that the actions of those officials in negotiating the sale was inconsistent with the claim that HHM sold in order to avoid imminent financial collapse.

The first formal reference to HHM's financial difficulties was made in this case in November, 1960 (see *supra,* p. 5). On September 1, 1959, both Mosman, the president and controlling stockholder of HHM, and Koontz, the president of Diebold, filed affidavits in connection with the government's motion for a preliminary injunction. Mosman stated that for some time he had considered selling the business; that, from time to time, he had been approached by a number of prospective purchasers, including Diebold; and that he wanted to sell "because of the problems that might arise in the event of his death" (R. 26, par. 3).

Koontz contended that it was Mosman who, in order to avoid his commitment to sell HHM to Diebold, had induced the government to file this suit and to seek a preliminary injunction (see *supra,* p. 4). Koontz stated that Mosman had indicated that he wanted to sell to provide funds for his estate taxes and that Mosman was concerned because he had no top management personnel to carry on the business which he had dominated (R. 6, par. 3). Koontz further

related that, in May 1957, he and Mosman had reached an oral agreement for a sale on the following terms: $1,000,000 for net current assets, $750,000 for machinery and equipment, and a 20-year lease of the buildings at $100,000 a year. Mosman, however, refused to go through with the agreement, insisting on a higher price (R. 6–7, par. 4). In May, 1959, negotiations were reopened and an oral agreement was reached which later was reduced to a formal contract. Koontz stated that subsequently (during the period when HHM was allegedly in financial difficulties) Mosman repeatedly sought to get out of the contract and that Diebold resisted these efforts, going so far as to make revisions in the contract that were advantageous to HHM and to Mosman personally (R. 6–13, pars. 4–26).[11]

After negotiations were reopened in May 1959 but before Diebold committed itself to the purchase, Mosman informed Diebold that there were inaccuracies in the uncertified HHM balance sheet, on which the parties had relied in connection with the sale. He disclosed that he had reclassified $100,000 of "receivables" as "cash." Diebold nevertheless went ahead with the transaction (R. 222a, par. 2).

H. *Other prospective purchasers.*—There were at least three prospective purchasers, not in competition with HHM, who were interested in acquiring the business of HHM (R. 345–356, 357, 269–281, 283–

[11] The changes in Mosman's employment contract obligated Diebold to pay Mosman's expenses and also his dues at a number of "City" and "Country" clubs (R. 394).

288). Negotiations with one of these began in 1958 and continued until the prospective purchaser learned of the sale to Diebold. The negotiations had proceeded to the point where the prospective purchaser had inspected HHM's plant, submitted detailed financial figures (proposing a purchase price of $3,400,000), named Hayden Stone & Co., a large investment banking firm, to form a purchasing group, and made plans for a public offering of stock (R. 345–356, 270, 271–72). Mosman stated, however, that the offer was unsatisfactory to him since it proposed a payment half in cash and half in long term notes, and HHM was interested only in a sale for cash (R. 270).

An established manufacturing company, which had expressed interest in buying HHM, similarly was informed that HHM would not consider any offer not involving a cash payment of approximately $3,000,000 (*ibid.*). Another potential purchaser, sponsored by an officer of the Bank of New York, was advised by Mosman in May 1959 that HHM was "not for sale" (R. 286, 271, 274–281, 284–288).

THE DISTRICT COURT'S DECISION ON THE MOTION

Ruling from the bench, the district court granted Diebold's motion. It stated (R. 589):

> The motion for summary judgment will be allowed within the principles enunciated by the International Shoe case * * * and, of course, you understand from that this case turns strictly on the principle there that this was a failing company, and we do not go into the merits of the competitive feature.

The court adopted the Findings of Fact and Conclusions of Law proposed by Diebold (R. 590). With respect to HHM's financial status, the court accepted the data concerning HHM's financial condition which Diebold had submitted in its supporting papers, and on the basis of these data concluded that "At the time of its acquisition by Diebold on September 11, 1959, and for at least 9 months prior thereto, HHM was hopelessly insolvent and faced with imminent receivership." (Fdg. 28, R. 569.) The court further found (Fdg. 31, R. 569–570): "By reason of its precarious financial condition, HHM could not long have survived as an independent competitor in its line of business and could not have achieved a sale to anyone else. But for the sale to Diebold, HHM would have been forced to liquidate its business in insolvency proceedings, with resultant heavy losses to employees, creditors, and stockholders." The findings make no reference to the information and data submitted by the government and summarized above.

With respect to the three other prospective purchasers, characterized in the findings as "promoters", the court found that none had made a "firm" offer; that "Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities" (Fdg. 26, R. 569; Concl. of Law 4, R. 570); and that "Diebold was the only bona fide prospective purchaser for HHM's business. Aside from Diebold, no one else ever made an actual offer for HHM's business or property" (Fdg. 30, R. 569).

In *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, 302–303, this Court held, as one of two grounds for setting aside a Commission order under Section 7 of the Clayton Act, that where a corporation was "in failing circumstances,"

> with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated * * * the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. * * *

This doctrine has become known as the "failing company" exception to Section 7. Its rationale is as follows: Section 7 prohibits only those acquisitions, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Where a company is in such severe financial straits that, if it attempted to continue as an independent enterprise, it would soon go out of business, it is no longer a significant competitive factor in the market. The elimination by merger, rather than through the

inevitable process of business failure, of a company that has ceased to be of any competitive significance cannot be said substantially to lessen competition.[12]

The mere statement of the doctrine and its rationale, however, emphasizes "the narrow scope of the exception" (Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 342; see, also, Note, 68 Yale L.J. 1627, 1664–1665). For, in terms of the acquired company's financial situation, an acquisition may be said to pose no threat of substantial injury to competition only if it is clear that, standing alone, the acquired firm would not be able to survive as an independent enterprise. A mere reversal of a company's previously favorable growth trend, or its temporary financial difficulties, or even actual operating losses over a relatively short period, are not enough to establish a "failing company" defense. A company in such circumstances may nevertheless still be an important competitive factor; and its elimination through merger may therefore substantially lessen completion or tend toward a monopoly, in violation of Section 7.

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[12] In *International Shoe* the charge in the complaint that the acquisition "tended to create a monopoly" had "not been pressed and may be put aside" (280 U.S. at 294). Consequently the "failing company" doctrine was enunciated solely with respect to lessening competition and restraining trade (see *id.* at 303). Where, as in the instant case, there are only a small number of companies in the relevant market, the acquisition of one by another may well "tend to create a monopoly", in violation of Section 7, even if it be assumed that the alternative to acquisition would be the elimination of the "failing company" from the market.

The legislative history of the 1950 amendment to Section 7 of the Clayton Act, 64 Stat. 1125, shows that Congress intended the "failing company" defense to be available under the amended Act. H. Rep. No. 1191, 81st Cong., 1st Sess., p. 6; S. Rep. No. 1775, 81st Cong., 2d Sess., p. 7; 96 Cong. Rec. 16601–16602, 16606. That history also indicates, however, that Congress was aware that the defense was available only if the acquired firm was truly "failing." For both the House and the Senate committee reports discussed the issue in terms of whether the proposed amendment would preclude the sale of a company which is in a "failing or bankrupt condition" (H. Rep. No. 1191 and S. Rep. No. 1775, *supra*), and both quoted the langauge from *International Shoe* set forth at page 21, *supra*, to show that the defense would be available in such circumstances. Similarly, the lower federal courts and the Federal Trade Commission have frequently recognized that an acquired firm cannot qualify as a "failing company" unless it clearly appears that the company could not continue as an independent enterprise.[13]

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[13] See *Erie Sand & Gravel Co.* v. *Federal Trade Commission*, 291 F. 2d 279, 280–281 (C.A. 3); *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800, 831–832 (C.A. 9); *United States* v. *Maryland and Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C.); *In re Pressed Steel Car Co., of New Jersey*, 16 F. Supp. 329, 338–339 (W.D. Penna.); *Pillsbury Mills, Inc.*, CCH Trade Reg. Rep. (1960-1961 FTC Cas.) Par. 29,277 at pp. 37,628–37,630) (pending on petition to review, C.A. 5); *Farm Journal, Inc.*, 53 F.T.C. 26, 47–48; cf. *Beegle* v. *Thomson*, 138 F. 2d 875, 881 (C.A. 7).

The basic error of the district court in the present case was its failure to recognize the narrow scope of the exception. The uncontroverted evidence shows that, in the years preceding the merger, HHM had substantially increased its sales and earnings, had considerably improved its financial position, and was, according to the customary indicia of business health, in a sound condition. It would create a serious loophole in Section 7 to treat such a firm as "failing." The result would be to sanction the acquisition of companies which would otherwise be able to continue as independent competitive firms, and without any examination of the effect of the acquisition upon actual competition in the market.

Admittedly, HHM did have financial problems in the summer of 1959. Those problems, however, plainly did not make it a company "with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" (*International Shoe, supra*). In these circumstances, the district court's conclusory findings that, at the time of the acquisition, HHM "was hopelessly insolvent and faced with imminent receivership" (Fdg. 28, R. 569), and "[b]y reason of its precarious financial condition, HHM could not long have survived as an independent competitor in its line of business" (Fdg. 31, R. 569–570), are clearly erroneous and should be rejected.

The undisputed evidence in this case shows that HHM was not a "failing company" under that doctrine as enunciated in *International Shoe*. The dis-

trict court thus plainly erred in granting Diebold's motion for summary judgment based on that defense. But even if the material submitted by the government in opposition to the motion did not compel rejection of the "failing company" defense, at the least it raised questions of fact which could be resolved only after a trial, and thus precluded granting summary judgment against the government.

ARGUMENT

I

THE UNDISPUTED FACTS SHOW THAT THE ACQUISITION DOES NOT COME WITHIN THE "FAILING COMPANY" DOCTRINE OF THE *INTERNATIONAL SHOE* CASE

In *International Shoe* this Court held (280 U.S. at 302) that an acquisition did not substantially lessen competition where:

(a) The acquired corporation's resources were "so depleted and the prospect of rehabilitation so remote" that it faced "the grave probability of business failure";

(b) there was no other prospective purchaser;

(c) the officials of the acquired company fully canvassed the alternatives to sale and "after much consideration felt compelled to choose the [sale] alternative"; and

(d) the purchaser's purpose was not to lessen competition.

In the present case, the undisputed facts show that none of the first three criteria is satisfied. The district court made no express finding with respect to

the fourth criterion and, on the basis of this record, none could have been made without a trial (see Point II, *infra*, pp. 42–44).

A. ***HHM Was Not in a Failing or Bankrupt Condition at the Time of the Acquisition.***

1. In *International Shoe*, this Court, on the basis of its analysis of the acquired company's financial history as disclosed in the comprehensive hearing record made before the Federal Trade Commission, found that its situation was such "as to necessitate liquidation or sale" (280 U.S. at 294); and that it was "a corporation in failing circumstances, the recovery of which to a normal condition was, to say the least, in gravest doubt" (*id.* at 301) and "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" (*id.* at 302).

In reaching this conclusion in the *International Shoe* case, the Court relied upon the following facts (*id.* at 299–300): The acquired firm lost more than $6 million in the year prior to the acquisition; within the year it had exhausted a surplus of $4 million and piled up a deficit of close to $4½ million; it owed $15 million to banks and $2 million on current account; new orders were not coming in and it was producing at only 15 percent to 18 percent of capacity; it had excessive commitments for raw materials, large inventories of finished shoes on hand, and inadequate funds to pay its debts as they became due; it had passed dividends on two classes of stock and was about to do so on the third; its annual financial statement, due to

be filed under Massachusetts law, would disclose that it was insolvent.

In contrast, the undisputed facts of the present case show no such picture of imminent financial disaster. Rather, they reflect an economically healthy company whose financial condition had steadily improved for many years prior to the acquisition. Instead of a $6 million loss in the year preceding the sale, HHM in fiscal 1959 had a net profit of $187,602.73 after taxes, a figure higher than in either of the two previous years (R. 334, Table 1). Instead of exhausting a surplus of $4 million and compiling a $4.5 million deficit in the year preceding the sale, HHM in fiscal 1959 for the first time had a tangible net worth in excess (by almost $400,000) of its total liabilities (R. 243). Instead of owing $15 million to banks and $2 million on current accounts, HHM in fiscal 1959 had reduced its liability on notes and loans payable from slightly more than $700,000 to slightly less than $300,000, and had no long-term debt (R. 331, par. A6). While the dollar value of HHM's sales in 1958, which was a recession year, had fallen slightly (six percent) from the 1957 peak (and inventories had increased by a similar percentage), the company (unlike the acquired company in *International Shoe*) paid its regular two dollar dividend, and had the highest retained earnings for the preceding five-year period, $2,247,986 (R. 331).

Indeed, the company had a history of almost uninterrupted growth. Its net sales rose from slightly more than $1 million in 1944 to more than $5 million

in 1949 and to $10.7 million in 1957 (R. 337). Although sales declined by about $300,000 or three percent, in each of the two succeeding years, net sales in 1959, the year of the acquisition, still exceeded $10 million (*ibid.*). The company's working capital was a minus figure in 1944, but in 1949 it was more than $200,000 and in 1959 more than $1,300,000, a six-fold increase in 10 years and the highest in its history (R. 340). In each of the five years between fiscal 1954 and fiscal 1959 the company made money and paid dividends, and also increased its retained earnings account from $1¼ million to $2¼ million. Payment of noncurrent bank loans as well as of the mortgage on its land, building and equipment had been completed within the three years preceding the sale (R. 331, par. A6).

2. Without disputing the foregoing data, Diebold argues (Motion to Affirm, p. 19) that the district court correctly treated such facts as "irrelevant and noncontrolling". The relevant and central consideration, Diebold urges, was "HHM's current position during the summer of 1959" (*ibid.*). During this period, it argues, following "a long period of expansion" allegedly supported by "inadequate working capital," there was a "cutback in sales" and a "sudden, sharp increase of inventories" (*ibid.*), and HHM's cash assets were not sufficient to pay its bills as they became due (*id.*, pp. 18–21).

This picture of HHM as an expanding, but marginal, enterprise caught in a sudden reversal of its fortunes from which it was unable to extricate itself, is,

as we have shown, contradicted by the record. The "cutback in sales" takes as its starting point HHM's sales in its peak year 1957 and then stresses the total decrease in two years of six percent. Such a relatively small decrease did not indicate imminent economic disaster; the lower sales figures for 1959 still gave HHM its third best year in its history (R. 337). Furthermore, HHM's return on net sales increased from 4.14 percent in 1958 to 4.73 percent in 1959, while that of its competitors declined: Diebold's decreasing from 11.48 percent to 10.81 percent and Mosler's dropping from 9 percent to 2.07 percent (Neisser Affidavit, Appendix Table 1).

The sudden "sharp increase of inventories" cited by Diebold apparently refers to figures purporting to show that inventories decreased from $1,833,652 in 1957 to $1,644,598 in 1958 and then increased to $1,906,342 in 1959 (R. 239).[14] This increase in inventories roughly paralleled the decrease in sales; it too gave no indication that the company was heading for insolvency. Diebold ignores the fact that the more than $1,300,000 of working capital available to HHM in fiscal 1959 was the highest in its history; that HHM's working capital ratio of 1.68 compared favorably to the highest ratio it ever achieved, 1.70 in 1951 and 1952 (R. 340); and that in 1959 HHM was able to obtain twice as many sales per dollar of available

[14] The government's figures introduced in opposition to the motion for summary judgment showed that inventories rose from $1,496,688 in 1958 to $1,600,152 in 1959, an increase of only $103,464 during the year (R. 335).

working capital as either Mosler or Diebold (Neisser Affidavit, p. 11, par. 20) and to show a profit of $36 for every hundred dollars of working capital while Diebold returned $41 and Mosler only $6 (*id.*, Appendix: Table 7).

We do not suggest that HHM in 1959 was without financial problems; in that period, as throughout its recent history, it was apparently operating on thin cash margins. But to ignore HHM's long-term development, exaggerate its short-term problems, and then characterize it as "hopelessly insolvent and faced with imminent receivership" (R. 569), is pure hyperbole. The record shows that the real reason why HHM was sold to Diebold was because HHM's president and largest stockholder wished for personal reasons to liquidate his investment and to secure the highest possible cash return therefor (R. 6, par. 3; R. 26, par. 3), and not because of the company's alleged financial problems.

A similar failing company claim, based on the acquired firm's temporary financial difficulties, was recently rejected in *Crown Zellerbach Corp.* v. *Federal Trade Commission,* 296 F. 2d 800, 831–832 (C.A. 9). In that case it was alleged that the acquired company's "management had been poor and inadequate; that it had obsolete equipment which it could not replace; and that its prospects for survival seemed dim" (296 F. 2d at 831). The evidence showed that the company had overextended itself in a modernization program and was having difficulties in financing this program; during this period of uncertainty the company's pres-

ident had died unexpectedly (*ibid.*). The record also showed, however, that the company had increased its sales and its earnings over the 10-year period prior to the acquisition and had regularly paid dividends (*id.* at 832). The court of appeals held that the "circumstances would permit a finding that the directors wanted to quit; but the record does not compel a finding that St. Helens was in a failing or near bankrupt condition. Quite the contrary." *Id.* at 831; see also *Pillsbury Mills, Inc.*, CCH Trade Reg. Rep. (1960–1961 FTC Cas.), Par 29.277 at pp. 37,628–37,630 (pending on petition to review, C.A. 5).

B. *Diebold Was Not the Only Available Purchaser of HHM; At Least Three Other Prospective Purchasers Were Interested.*

1. In *International Shoe,* the Court stressed that International was "the only available purchaser" (p. 301) and "there [was] no other prospective purchaser" (P. 302). The significance of this factor is that the willingness of other persons to invest in and operate the business strongly "suggests that the hopelessness of its position may be open to question and that new capital and new methods may be applied to improve the situation" (Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 345). Moreover, the existence of other prospective purchasers may not only show that the company is not "failing," but may require the rejection of the defense without regard to the firm's financial position. For if such other purchasers are not existing competitors of the acquired company (as

in the present case, see *infra*), their acquisition and operation of the firm would permit it to continue as a competitive factor in the market. Where such a sale is possible, the acquisition of the company by a competitor, even at a higher price, may violate Section 7 because of its anticompetitive effect. See Bok, *supra*, pp. 346–347; Note, 68 Yale L. J. 1627, 1666–1668.

2. In the present case, the district court found (Fdg. 30, R. 569) that "Diebold was the only bona fide prospective purchaser for HHM's business. Aside from Diebold, no one else ever made an actual offer for HHM's business or property." This finding is contradicted by the unchallenged evidence in the record; it is clearly erroneous.

The district court itself found (Fdg. 26, R. 569) that "[w]hen a rumor spread around during the latter part of 1958 and the first half of 1959 that the stock or assets of HHM might possibly be for sale, three different promotors solicited the HHM ownership-management to consider tentative schemes for acquiring, merging, or exchanging the stock or assets of HHM." The record shows that these three "promotors" were all apparently seriously interested in acquiring HHM, and that at least one of them expended considerable time and money in looking into the possibility.

James Boyce was the president of a heavy construction machinery company and had other business interests, but none connected with the bank vault equipment field. Boyce stated that his company "was

definitely interested in acquiring [HHM] and had devoted considerable time and money towards this end" (R. 345–346); that "negotiations had progressed to the point where I went to Hamilton, Ohio, to meet with Mr. Mosman and looked over his facilities" (R. 345); and that these negotiations had continued until he learned of the sale to Diebold (*ibid.*). A lengthy memorandum (R. 347–355), prepared for Boyce, showed (a) that the matters of price, methods of financing and management had been analyzed, (b) that tables showing various HHM income and balance sheet items projected over a ten-year period had been under study, (c) and that Hayden-Stone & Co. (a large investment banking firm) had been named to form a purchasing group.

Mosman, the president of HHM, admitted in answer to interrogatories that in 1959 Boyce had made "[a]n oral offer * * * to acquire all the assets, except land, buildings and life insurance, for $3,000,000" (R. 270). HHM did not accept the offer because it "was interested only in a sale for cash * * *" (*ibid.*).

The Bank of New York, inquiring in the spring and summer of 1959 on behalf of a director of the American Chain & Cable Company, was told that HHM "is not for sale" (R. 286, 270–271, 274–281, 284–288). Officials of another company met and corresponded with Mosman regarding the purchase of HHM (R. 272–274, 357). Mosman told them that he would not sell for less than $3,000,000 "in cash" (R. 270).

3. The district court found (Fdg. 26, R. 569) that "[n]one of these overtures ever approached the

concreteness of a firm offer or a firm price and no financial data or operating figures were supplied by HHM. Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities." But in view of the uncontradicted facts set forth above, this finding (to the extent that it is accurate) is irrelevant to the issue whether the failing company defense is available.

Acquisitions of major industrial concerns necessarily involve exploratory discussions and investigations, and a prospective purchaser is no less "available" or "bona fide" because he has not yet reached the point of making a firm offer. Indeed, in view of the fact that "no financial data or operating figures were supplied [to the three other prospective purchasers] by HHM," it is hardly surprising that no other firm offers were made. The finding that "Diebold made the only firm, bona fide offer to pay $3,000,000 cash and to assume all liabilities" merely indicates that Diebold was the only purchaser who was willing to meet the precise terms on which the sale was finally made. It does not indicate that other prospective purchasers were not interested. See *Erie Sand & Gravel Co.* v. *Federal Trade Commission,* 291 F. 2d 279, 280 (C.A. 3), where the court pointed out that "although Erie was high bidder with an offer of about one million dollars, there were several other substantial offers of $800,000 or more for the going concern. Thus, had Erie not bid, the prospect was not the elimination of a competing enterprise but merely its continuation under some new proprietorship."

C. *HHM Would Not Have Been Required to Liquidate its Business in Insolvency Proceedings if it Had Not Been Sold to Diebold.*

1. In *International Shoe* this Court stressed that the officers of the acquired company "after long and careful consideration of the situation, concluded that the company was faced with financial ruin, and that the only alternatives presented were liquidation through a receiver or an outright sale" (280 U.S. at 299); that, before deciding to sell, the officers, stockholders and creditors had given "much consideration" to other alternatives, such as obtaining additional bank loans, reorganizing through a receivership, or going into bankruptcy (*id.*, at 301–302); and that the sale of its capital stock was made "in order to avoid what its officers fairly concluded was a more disastrous fate" (*id.* at 301). The significance of such thorough investigation and consideration by the officials of the acquired company is that it serves to demonstrate that sale is, in fact, the only real alternative to letting the company go out of business.

2. In the present case, however, there is no evidence in the record that the HHM management selected sale of the business as an alternative to the "more disastrous fate" of "financial ruin" or "liquidation through a receiver."

The district court found (Fdg. 31, R. 569–570) that "[b]ut for the sale to Diebold, HHM would have been forced to liquidate its business in insolvency proceedings." To the extent that this finding merely reflects the court's view that HHM was facing imminent financial collapse at the time of the acquisition,

we have already shown that it is clearly in error. To the extent that it states that there was no alternative other than sale available to HHM, it has no support in the record.

The only evidence in the record touching on the need for liquidation is the statement of Mosman, HHM's president, that, as the result of an unfavorable wage contract entered into with the union in the spring of 1959, "I gave serious consideration to recommending to the Board of Directors that the company be liquidated" (R. 267). This falls far short of the kind of intensive consideration by the company's officials that led to the determination by the acquired company in *International Shoe* to liquidate by sale. In that case the former vice-president of the acquired company testified that the company's executives discussed its financial "conditions" "[a]lmost daily" in 1921 and that it was their "feeling" at that time that the company "was rapidly going on the rocks" (Record on appeal, No. 42, O.T., 1929, p. 292). He further stated (*id.*, p. 294) that, "[f]aced with this situation * * * the executives * * * considered all possible alternatives for saving the company from receivership and liquidation; a study was made as to the possible alternatives; only one alternative seemed to offer any hope of success. * * * That was to negotiate a sale of the company to the International Shoe Company, who seemed to be the only possible customer in the United States at that time * * * who would be in a position to even consider such a transaction. * * * We made a fairly

careful study and careful inquiries before reaching that result."

If HHM really was in a precarious financial condition in 1959, facing imminent insolvency and liquidation, its management would undoubtedly have made similar careful studies as to possible solutions. There is nothing in the record that shows any such inquiries. On the contrary, Mosman's attitude toward the other prospective purchasers was, at best, unenthusiastic; his position was that he would not sell unless he received $3,000,000 in cash. The explanation for his attitude is not difficult to discover. The evidence in the record dealing with his motive for selling—sparse though it is—shows no indication that he believed a sale was the only alternative to insolvency. On the contrary, the record shows that Mosman wished to liquidate his investment in HHM primarily for tax purposes and also because of his concern that, if he became ill or incapacitated, there was no top management available to carry on the business successfully (R. 6, par. 3, R. 26, par. 3). Although Mosman was the person most familiar with HHM's financial condition, he never stated, suggested, or indicated any belief that the company was facing imminent financial collapse. Moreover, Diebold itself did not raise the failing company defense until many months after the government's complaint had been filed (see *supra,* pp. 4–5).

* * * * *

In sum, the failing company defense is applicable only where the record clearly shows that the basic economic condition of the acquired business, includ-

ing its history of, and prospects for, growth and development, indicate that collapse is imminent. The record in this case plainly does not establish such likelihood of collapse. At most, it shows that, despite HHM's impressive record of growth, development and basic financial soundness, the company had some short-term financial problems in 1959. That is surely not enough to establish that the company was "failing" within the *International Shoe* doctrine.

II. THE FINDINGS UPON WHICH THE DISTRICT COURT UPHELD THE FAILING COMPANY DEFENSE REST UPON MATERIAL FACTS AND INFERENCES WHICH ARE THE SUBJECT OF DISPUTE; SUMMARY JUDGMENT WAS THEREFORE IMPROPER

This Court in *Poller* v. *Columbia Broadcasting System, Inc.*, No. 45, this Term, decided February 19, 1962 (slip op., p. 3), recently reemphasized that Rule 56(c) of the Federal Rules of Civil Procedure [15]

> authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues

[15] Rule 56(c) authorizes the entry of summary judgment if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

to try." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944).

In Point I, *supra*, we have argued that, on the basis of the uncontroverted facts in the record, the district court should have rejected the "failing company" defense. But even if we are wrong in that argument, those facts at least raised a number of factual issues that precluded the grant of summary judgment in favor of Diebold. On this record, there were genuine issues with respect to the following material facts relating to the failing company defense: (1) whether HHM faced imminent financial collapse; (2) whether there were other bona fide prospective purchasers; (3) whether a sale to Diebold was the only feasible course open to HHM to avoid termination of its business and the dispersal of its assets; and (4) whether Diebold had an anticompetitive purpose in acquiring HHM.

1. As we have proved, the undisputed facts did *not* show that HHM faced imminent financial collapse. The data submitted by the government established that the company had a long record of good earnings and dividends, that it was free of long-term debt and had substantially improved its financial position, and that at the time of its acquisition it was operating successfully (*supra*, pp. 8–16). These data demonstrated that the issue whether HHM faced imminent financial collapse was, at the least, not free from doubt. In addition, there were the opinions of a government economist and accountant that before the acquisition HHM was in a sound financial condition

and was neither in a failing condition nor heading in that direction (R. 333, 600).

Furthermore, the court's conclusory finding of imminent financial collapse was based on subsidiary findings, many of which were themselves contested or based on inferences drawn in favor of Diebold, contrary to the settled rule that on a motion for summary judgment the court looks "at the record * * * in the light most favorable to * * * the party *opposing* the motion * * *." *Poller* v. *Columbia Broadcasting System, Inc., supra,* at p. 9 (emphasis added). For example, the court found that "in fiscal 1959 * * * inventories built up in the amount of $262,000" (Fdg. 8, R. 563), whereas the government's data, which were based on the company's certified annual financial statement, showed the increase in inventory to be only $103,463.88 (R. 335). The court found (Fdg. 4, R. 562) that HHM made "frequent" use of bank loans to finance the company's annual sales volume. The record does not show that such loans were "frequent". This is an inference drawn by the court in favor of Diebold, apparently on the basis of a generalized statement that bank loans had been made for such purpose (R. 266). The court found (Fdg. 5, R. 562–563) that "[i]n an effort to improve its net working capital position, HHM consistently retained * * * the proceeds from the periodic liquidation of its readily disposable divisions and subsidiary companies." Again, this is an inference drawn in favor of Diebold. For the only record support for this finding is a statement by Mosman, the president of HHM, that "[i]n an

effort to concentrate its business activities in Hamilton [the location of it principal plant] * * *" (R. 266), the company sold various assets and retained the proceeds in the business. An effort to concentrate business activities at the main plant is not the same thing as an effort to improve net working capital position.

The court also made various findings that HHM's cash position was critical, that it was short of working capital, and that it was overdrawn on its bank accounts (Fdgs. 3–6, 9–13, R. 562–565). These issues were in dispute, however, for it was the opinion of the government's expert that HHM's cash position was not critical and that a company such as HHM, whose principal customers are the federal government and substantial banking institutions, has less need to keep its assets in the form of cash than a company with many small customers (*supra*, p. 13). The record also showed that HHM always had sufficient funds in its accounts to cover all checks presented for payment (*supra*, pp. 13–14). Furthermore, by entering summary judgment, the court foreclosed the government from showing that to a large extent any deterioration in HHM's cash position occurred after HHM and Diebold had orally agreed in May 1959 on the basic terms of the agreement (*supra*, pp. 14, n. 9, 16, 18), which required Diebold to pay all of HHM's liabilities unpaid at the date of closing (R. 382);[18] and that any subse-

[18] With exceptions, such as tax deficiencies for prior years, not here relevant.

quent weakening in HHM's cash position was not the result of any inherent weakness in the company's operations or financial condition.

2. We have discussed in Point I, *supra*, pp. 31–37, the evidence showing that Diebold was not the only prospective purchaser of HHM, and that sale to Diebold was not the only feasible alternative to financial ruin. In any event, this evidence raised sufficient factual questions on those issues to preclude the district court from granting summary judgment in favor of Diebold.

3. The district court made no explicit finding as to Diebold's purpose in acquiring HHM. It did find, however, that "Diebold was in need of additional plant space" (Fdgs. 27, 29, R. 569), thus suggesting that this, rather than the elimination of a competitor, was the purpose of the purchase (cf. *International Shoe*, *supra*, 280 U.S. at 302).

There was evidence in the record, however, which was sufficient to raise a question whether Diebold's purpose was to lessen competition. Diebold paid $3,000,000 in cash and agreed to assume liabilities of about $1,800,000 for the assets of a company whose total net worth was approximately $2,300,000 (R. 334, Table 4; R. 243). This disparity between the net worth of HHM and the price Diebold paid at least suggested that the elimination of a competitor may have been Diebold's purpose in buying HHM.

The government also filed the affidavit of a small businessman who reconditioned and sold used bank vault doors and safes (R. 395–402). He stated that

after Diebold in 1958 had acquired a bank vault equipment manufacturer which had been one of his principal customers for rebuilt doors since 1955, he turned to the manufacture of safe deposit boxes (R. 396). An executive of Diebold then came to his office and "offered to throw some Diebold installation and service work my way if I would agree to stop production of safe deposit boxes" (R. 397).

Additional facts, which raised a question as to Diebold's purpose, were the following: Diebold agreed to employ Mosman, the president of HHM, for nine years at a generous salary (R. 96, 391–395), and also agreed to pay Mosman's expenses and dues during this period at various "clubs" (R. 394). Before Diebold committed itself to the purchase, it had learned that there was at least one significant inaccuracy in the April 30, 1959, balance sheet upon which the parties relied in connection with the sale (R. 222a); it nevertheless went ahead with the transaction. Furthermore, despite this disclosure, Diebold agreed, with certain exceptions (R. 382; R. 10, Par. 19), to pay (a) HHM's obligations reflected on this April 30, 1959, balance sheet which were unpaid at the date of closing, *and* (b) those incurred after April 30, 1959, and unpaid at the date of closing (R. 382). In addition, since acquiring HHM, Diebold has closed down HHM's sales offices (R. 183–185, 192–199) and has continued in its employ only 370 of the 664 HHM employees (R. 568–569, Fdg. 25).

Looking at this record in the light "most favorable to [the government], the party opposing the motion"

(*Poller, supra*), it is clear that no summary determination of whether Diebold had an anticompetitive purpose could be made.

* * * * *

In sum, as to none of the foregoing integral elements of the "failing company" defense could it be said "there [was] conclusive evidence supporting [Diebold's] theory." *Poller, supra,* at p. 9. The district court, therefore, improperly granted the motion for summary judgment. Even if the record did not require rejection of the failing company defense, it plainly precluded its summary acceptance without a trial.

CONCLUSION

For the foregoing reasons, the order of the district court granting the motion for summary judgment should be reversed and the case should be remanded to the district court with instructions to proceed to trial.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, *Appellant*,

v.

DIEBOLD, INCORPORATED, *Appellee*.

On Appeal from the United States District Court for the Southern District of Ohio

---

BRIEF FOR THE APPELLEE

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---

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

The Government's formulation of the Questions Presented is based upon a Government economist's evaluation of the published reports of HHM, the acquired company. But the uncontradicted evidence showed, and the District Court found, (Fdg. 20, R. 567) that "HHM's 'book' figures failed completely to

reflect the actually insolvent condition of the company." Accordingly, if account is taken of the actual condition of the acquired company, as shown by its internal working papers, and as undisputed on the record, the question presented is properly:

Whether the District Court was correct in applying the "failing company" doctrine of the *International Shoe* case where the uncontradicted evidence, as found by the District Court:

(A) established that for the nine months prior to the sale, the acquired company was so critically short of working capital that it was compelled, *inter alia*, (1) to meet its payrolls and pay its past-due creditors through substantial checking account overdrafts that were sustained only through constant manipulation of an elaborate check "floating" scheme; (2) despite the check floating scheme, to permit its past-due and current trade bills to run up to a total of approximately $750,000 at the time of sale; (3) to inflate its bank balances through the simultaneous "paper" deposits in a number of banks of checks for identical amounts representing in fact a single sum of money; (4) to borrow on demand notes to the limit of its principal depository's legal ability to loan; and (5) to permit its balance in its principal depository to decline to a book figure of $13.92, while actual overdrafts in the amount of $73,127.80 were outstanding on this same bank,

(B) established that it was incurring heavy losses and that its condition was in general substantially deteriorating in the period before the acquisition, and

(C) further established that a quick cash sale was made to the only prospective purchaser to which HHM could have in fact made a sale, Diebold, which was unaware of HHM's desperate cash position and true financial condition.

STATEMENT

This is an appeal from a judgment of the District Court for the Southern District of Ohio in favor of appellee, Diebold, Incorporated (Diebold), in a suit brought by the Government under § 7 of the Clayton Act, challenging Diebold's acquisition of the assets of Herring-Hall-Marvin Safe Company (HHM).

The complaint was filed on August 24, 1959. On March 8, 1961, after prolonged discovery had been had by the Government, but before trial of the Government's affirmative case, the Court concluded, on the basis of the extensive proofs of both parties submitted on Diebold's Motion for Summary Judgment, that the acquisition did not violate § 7 because, at the time thereof, HHM was a "failing company".

The District Court found that there was no genuine issue as to any material fact (R. 570), and concluded that at the time of its acquisition by Diebold on September 11, 1959, and for at least nine months prior thereto, HHM was hopelessly insolvent and faced imminent receivership (Fdg. 28, R. 569). The District Court found that because of its precarious financial condition, HHM could not long have survived as an independent competitor in its various lines of business. But for the sale to Diebold, the Court concluded, HHM would have been forced to liquidate its business in insolvency proceedings, with resultant heavy losses to its employees, creditors, and stockholders, and the community it served (Fdgs. 28, 31, R. 569-70; R. 200).

The District Court found that Diebold purchased on HHM's terms, in reliance on HHM's representations, and without adequate access to HHM's books and records. It concluded that Diebold was the only bona fide purchaser for HHM's business; that no one else

ever made an actual offer for HHM; and that by reason of its precarious financial position, HHM could not have achieved a sale to anyone else. With respect to certain other parties who at times had made overtures with respect to HHM, the Court found that "none of these overtures ever approached the concreteness of a firm offer or a firm price and no financial data or operating figures were supplied by HHM" (Fdgs. 26, 29, 30, 31, R. 569-70).

The District Court accordingly ruled that Diebold was entitled to judgment as a matter of law under the "failing company" doctrine of the *International Shoe* case.

* * * *

It is necessary, for a proper understanding of the District Court's judgment, to make a full statement of the undisputed basic facts relating to the "failing company" issue as presented to the Court below. The record is an extensive one. In an important part it is comprised of the special audit reports of independent certified public accountants (Lybrand, Ross Bros., & Montgomery) who analyzed HHM's internal books of account after the acquisition. We shall first set forth the data—based largely upon the company's internal working papers—as to HHM's financial condition in the critical period in 1959, which the District Court deemed controlling. Next, we shall set forth the financial material submitted on the motion by the Government—based almost wholly upon the company's formal reports primarily prepared for creditors and relating to the so-called "long-term"—which the District Court deemed not to be dispositive or controlling on the failing company issue. Finally, we shall set forth the record on certain other aspects of the issue.

A. The Acquisition and HHM's Failing Financial Condition

1. *The Acquisition.*—On September 11, 1959, Diebold acquired the assets of HHM for $3,000,000. The acquisition resulted from an offer by Warren Mosman, President of HHM, of a quick cash sale of HHM's assets. The sale was contingent upon a swift consummation, without complete analysis of HHM's books and records. Diebold purchased on HHM's terms, in reliance on HHM's representations, and without access to HHM's internal books and records (Fdgs. 1, 2, 29, R. 561-62, 569).

2. *HHM's long-term financial background.*—The financial background of HHM before the acquisition showed a pattern of a long-term expansion of sales on a totally inadequate working capital base, followed by a two-year period of constriction in HHM's business, with the last year featured by a desperate shortage of essential working capital to support the business' operations.

From June 1950, down through the date of the acquisition, HHM had been short of working capital (Fdgs. 4, 6, R. 562-63; R. 266, 255). HHM's current ratio (the relationship of its current assets—including inventories and more liquid assets alike—to its current liabilities) averaged only approximately 1.5 for the years 1951 through 1959, in contrast with an average of 2.7 during the same years for all manufacturers of fabricated metal products (Fdg. 6, R. 563; R. 255). Against this backdrop of a continually "thin" current position, HHM's net sales rose from $5,023,270 in 1949 to $6,898,633 in 1954, and to $10,672,279 in 1957 (R. 337, 266).

During this period of growth in HHM's sales volume, not supported by adequate working capital, there oc-

curred from time to time periods of sales "plateaus" in which the annual rate of growth of HHM's sales slowed down or ceased. During these plateaus a sharp increase in the overhead costs of HHM's operations relative to its sales would be experienced. Representative of this manifestation were the periods 1948-50 and 1952-55 (R. 337).

After the record figure of $10,672,279 in sales was reached in fiscal 1957,[1] Mosman set a sales goal of $14,250,000 for 1958 (R. 266). However, 1957 introduced the first postwar recession which Mosman found to be "moderately severe", and HHM's sales for fiscal 1958 amounted only to $10,301,000 or 30 percent less than its quota, and $371,000 less than 1957 (R. 266). For fiscal 1959, Mosman again sought to increase sales and set a more modest quota of $12,500,000, but the company's business continued sluggish and sales fell even below the fiscal 1958 figure, to $10,023,000. Mosman then recognized for the first time that the abnormal demand created by the postwar boom had come to an end and that the level at which normal continuing demand was stabilizing was such as to create a substantial over-capacity for the products of the company (R. 266).

Consequently, competition for the limited amount of business increased sharply and it was necessary for HHM to take orders at lower prices (R. 266). Concomitantly, the conviction was driven in upon Mosman that only a substantial investment of additional capital could produce the improvement of plant facilities and production techniques necessary if the company was

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[1] During the relevant period, HHM was on a fiscal year running from July 1 to June 30, referred to as of the year in which it ended.

to survive (R. 266). However, prospects of improving the efficiency of the plant were severely handicapped by the attitude adopted by the Union (R. 267).

3. *The 1959 Union contract.*—In March 1959, the Union which represented most of the hourly-rated production and maintenance workers in HHM's plant approached HHM for negotiations looking toward a new labor contract. It presented demands for wage costs which were higher than those in the area or in the industry; and the Union refused to allow the company to adopt a "wage incentive" program which was common in the rest of the industry. Although HHM deemed the demands excessive, because of its extremely weak working capital position, the company could not stand a strike, which the Union had threatened. Accordingly, HHM acceded substantially on the terms of the Union. It was then necessary to increase the hourly rates and the fringe benefits of the other employees who were not represented by the Union. Before acceding to the Union's demands, Mosman gave serious consideration to bringing before his Board of Directors a recommendation that the company be liquidated (Fdg. 15, R. 565-66; R. 267).

4. *Practices of HHM with respect to financial statements.*—HHM was a closely held corporation, and on the operating side virtually a one-man operation by Mosman (R. 25, 261). The District Court found that during the 1950's, although the annual balance sheets and profit and loss statements of HHM purported to show a modest annual improvement in the company's financial condition, these "book figures" failed completely to reflect the actual condition of the company (Fdg. 20, R. 567).—The "book figures" were furnished

to, and relied upon by, HHM's source of bank credit (R. 457, 461-62).

The District Court found that HHM's books were made up in accordance with management policy (*Ibid.*). The record reflects various examples of such practices:

(a) The Treasurer of HHM was informed by Mosman in a "Personal and Confidential" memorandum on June 16, 1958, of the following "goals for June 30, 1958"—the end of the fiscal year: "As I told you, I would like the following things done before the end of June . . . I would like to show a net profit, after taxes, of at least $150,000 . . . I would like to show a net worth of approximately $2,100,000." (R. 560). The Treasurer endorsed "O.K." on the memo (R. 560). As of June 30, 1958, HHM's profit and loss statement showed a net profit, after taxes, of $188,814, and the balance sheet showed a net worth of $2,126,502 (Fdg. 20, R. 567).

(b) In 1959, an interim balance sheet, stating receivables as if they were cash, and concealing overdrafts, was issued by HHM (R. 222a; see Fdg. 2, R. 561-62).

(c) On June 30, 1959, the company's books as of the close of its fiscal year omitted $46,858 of checks which had been already issued (R. 228).[2]

5. *The current position of HHM in 1959.*—By 1959, HHM was falling 25 percent below its sales goals. In fact, net sales had shrunk annually by approximately $300,000 per year from the peak fiscal year of 1957

[2] This misstatement was apparently caught in the regular audit of HHM's books by Lybrand, Ross, HHM's regular auditors (R. 228).

(Fdg. 7, R. 563; R. 266). Mosman noticed for the first time the changed, and considerably adverse, conditions with which the company was confronted (R. 266). The shortage of working capital to which the company had been subject for years became acute. In June 1959, HHM's current position was such that its net quick asset ratio (the relationship between cash and Government securities on the one hand, and current liabilities on the other) had dropped to .074.[3] This means that HHM's cash and Government securities, as of that month, amounted to only 7.4 percent of its *current* liabilities. The average figure for all companies in the fabricated metal products industry[4] was 37 percent—five times HHM's figure (Fdg. 6; R. 563, 267, 256).

6. *Internal cash generation inadequate despite partial liquidations.*—This adverse net working capital position had obtained despite the past retention by

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[3] The Government questions the use of this particular ratio (Gov. Br. 10, n. 5). It is a ratio used in the "Quarterly Financial Reports for Manufacturing Corporations" published by the FTC and SEC (R. 255-256). Obviously it is the severest, and, consequently, in an emergency situation, the most important of the financial ratios used to test liquidity. "It is obvious that a business which maintains current assets barely equal to its current liabilities will be in a weak financial condition if half or more of the current assets consist of merchandise and receivables. This would mean that in an emergency requiring payment of all current debt, the merchandise and receivables would need to be sacrificed. Either of these events would mean liquidation." Francis, The Small Businessman and His Financial Statements, (U.S. Dept. of Commerce), p. 16. See also Kennedy, Financial Statements (1947), p. 213.

With HHM, it was not simply a case of cash equal to less than half current liabilities. The ratio ranged from .07 to .03 in the critical period (R. 256, 557).

[4] A term of comparison also used by the Government's accountant. See R. 333.

HHM of substantially all of its earnings after taxes. In an effort to improve its net working capital position, HHM consistently retained substantially all of its earnings; annual dividends paid were less than $12,000 during the late 1950's, and the last such dividend was paid in the fiscal year commencing July 1, 1958 (R. 334, 255). Nor was HHM's position cured by the retention of the proceeds, totalling close to $500,000, from the periodic liquidation of HHM's productive assets. In 1954, HHM received, and retained, $150,000 in insurance proceeds resulting from the destruction by fire of the facilities of a subsidiary, Thomas Manufacturing Company. In fiscal 1955, it sold its Quickdraft Division for $100,000. In fiscal 1959, HHM sold its Remington Division for $90,000, and its Canadian subsidiary for $130,000 (R. 266-67). No distribution in respect of these sales was made. Despite this, the net quick asset ratio of .074, which prevailed in June 1959, was the worst since Mosman took over the company in 1951 (R. 267).

7. *The commencement of operating losses.*—In fiscal 1959 (running from July 1, 1958 through June 30, 1959), sales were falling by approximately $300,000 at an annual rate. During the same period inventories built up by $262,000[5] (Fdg. 8, R. 563; R. 239, 266).

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[5] The Government points to a discrepancy between the inventory build-up reported by Lybrand, Ross in HHM's certified statements and that reported by that firm in its special audit reports filed with the Motion for Summary Judgment (Gov. Br. 12, and n. 6). The figures in the published statements included, in the case of the 1958 balance sheet, HHM's subsidiaries which were sold in fiscal 1959 (R. 266-67, 335). The special audit reports, which we quote, do not. The Government accountant recognized this difference (R. 332). Since it was only HHM's own assets which were sold Diebold, the treatment used in the special report is obviously preferable.

Following the end of the fiscal year 1959, for the period between July 1 and September 10, 1959—the day before the closing—it was later revealed, during the subsequent audit, that HHM had suffered operating losses of $206,953.51 (Fdg. 16, R. 566; R. 222b). On an annual basis, this volume of losses would indicate a loss rate in excess of $1,000,000. The company had not previously in the 1950's had occasion to experience the effects of a losing year when coupled with its continually adverse liquidity position (R. 337).

8. *Badges of insolvency.*—The company's desperate cash and working capital position gave rise to the following manifestations in the critical months of 1959 prior to the acquisition:

(a) *Repeated overdrafts.* HHM's bank balances at its principal depository, The First National Bank and Trust Company of Hamilton, Ohio, reflected modest minimum monthly balances, per statement, during 1959. (The height of modesty in these minimum monthly balances was reached shortly before the acquisition in September 1959, when the company's minimum balance per statement reached $13.92.) (Fdg. 13, R. 564-65; R. 222d). But even these meager balances per bank statements did not reflect HHM's true condition, because the statement balances failed to reflect the overdraft checks sent to creditors, and already in the process of collection, which had not yet cleared the drawee bank.[6]

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[6] The Government has suggested that HHM's bank accounts "were never overdrawn" (Gov. Br. 13). This is, we respectfully submit, an extreme misuse of language. What the Government means is that although HHM habitually sent out checks to its creditors without having money in the drawee bank sufficient to cover them—and frequently with very substantial overdrafts on

On 69 of the 144 working days between April 1, 1959 and the consummation of the sale on September 11, 1959, HHM had checks drawn and outstanding in excess of its actual balance on account at The First National of Hamilton. These daily overdraft figures, conservatively stated, ranged in amounts between $104.51 and $78,394.58.[7] On 41 days during the same

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those accounts by virtue of outstanding checks—by the time that the checks found their way of the drawee bank, funds sufficient to cover them had subsequently been deposited. We submit that most reputable firms and individuals would consider this practice of HHM to be that of writing overdrafts. This usage is confirmed by standard treatises on accounting. See Finney & Miller, Principles of Accounting, Intermediate (5th ed. 1958), p. 188; Guthmann, Analysis of Financial Statements (1953), p. 75. "When the balance sheet has not been audited, a dishonest or an ignorant proprietor has been known to show his bank balance, without regard to his outstanding checks, as cash in the bank." (*Ibid.*) We do not believe that the Government seriously means to adopt the same usage.

[7] The Government suggests that Diebold's figures for HHM's overdrafts were misstated, inasmuch as HHM followed the policy of drawing and dating checks but putting them to one side for a period of months before issuance. Accordingly, the Government suggests that Diebold's figures as to the overdrafts may include an indeterminate number of checks which had not at the time been issued by HHM at all (Gov. Br. 13-14).

But this is an obviously erroneous reading of the record. The independent auditors who computed Diebold's figures for HHM's overdrafts did not treat a check as having been issued and outstanding as of the date on which it was written and dated. Instead, because of HHM's practices, the accountants treated a check as being outstanding only as of the date indicated by the first bank stamp on its back (R. 585-86). Thus, there are no figures included in the overdraft figures for checks which had been drawn and dated but not actually issued.

If anything, the accountants' method of ascertaining when HHM had issued a check—by inspection of the first bank stamp on its back—tended to understate the amount of overdrafts. This is because obviously such a check would have been mailed to the payee sometime in advance of his receipt of it and deposit of it

period the company had total net overdrafts on all of its commercial bank accounts. In other words, applying its balances on account in banks other than The First National of Hamilton to its overdraft there,[8] a net overdraft position would still be revealed on 41 of the 114 working days in the last five and a half months before the acquisition. These overall net overdrafts, on a daily basis, varied from $1,123.72 to $66,890.68 (Fig. 9, R. 563-64; R. 222b-c, 223-24).

(b) *Settling overdrafts through overdrafts.* It was subsequently disclosed that on every pay day for the HHM plant during the entire month of May 1959, HHM's regular payroll account in its principal depository had payroll ovedrafts outstanding against it. That is, the balance on hand was not sufficient to cover the checks issued to the plant workers by way of payroll. These payroll overdrafts ranged in amounts from $24,466.29 to $54,297.52. During at least half of the month, overdrafts on the regular payroll account were subsequently reimbursed by overdrafts on the

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in his bank, which would be the first possible date at which it might acquire a bank date stamp. When the checks at any given time which had been issued and sent to creditors but which had not yet received a bank dating stamp are taken into account, it is apparent that the overdraft figures for HHM would be even larger, and the total number of days on which it was overdrawn quite likely greater. This is the reason why the independent auditors who prepared the overdraft figures would not certify to the figures as exact, but simply stated that the amounts of checks outstanding totaled "at least the amounts reflected in the reconciliations and produce[d] overdrafts at least in the amounts shown on the Report of December 8, 1960" (R. 551-52).

[8] We make this computation only for the purposes of illustration; the proper accounting usage is even more severe. Generally, an overdraft in one bank should be considered to be not simply an offset to cash balances elsewhere, but a current liability. See Kennedy, Financial Statements (1947), p. 30.

company's general account in the same bank. During this period the general account itself had overdrafts outstanding against it in amounts ranging up to $116,809.86. Moreover, during this period the HHM accounts in all banks had net overdrafts outstanding against them in substantial amounts—as high as $79,037.17 (Fdg. 10, R. 564; R. 222c, 233).

(c) *Creation of fictitious balances through multiple deposits and withdrawals.* The following extraordinary transaction was repeated on numerous distinct occasions. On January 30, 1959, HHM drew a check for $34,000 on its account at the Wells Fargo Bank of San Francisco. This check was deposited in HHM's account in the Irving Trust Company of New York City. On the same day a check for the same amount was drawn against the Irving Trust and deposited in HHM's account at People's First National Bank & Trust Company of Pittsburgh. Again on the same date, a check for the same amount was drawn on People's for deposit in HHM's account in The First National Bank and Trust Company of Hamilton, Ohio.

Thus, by the simultaneous transfer and re-transfer of a single $34,000 deposit, on February 2, 1959, HHM was able to create a total aggregate balance of $136,000 in these four banks scattered across the North American continent. The same method of operation, which bears striking resemblances to what is popularly called "kiting", was followed by HHM on six other occasions in the first half of 1959, always involving the same four banks. On these seven occasions, a total aggregate balance of $617,500 was created by this procedure. There were other transactions involving artificial balances created by "float" in which fewer banks were involved (Fdg. 13, R. 565; R. 554-55).

(d) *Heavy use of demand loans.* During the period in question, HHM borrowed money on a demand note basis from its principal bank depository in Hamilton, Ohio. The notes never had a fixed term, but were all subject to the arbitrary call of the bank. The bank was limited by law to making loans not in excess of $300,000 to any one customer. During 1959, HHM's demand notes never fell below $250,000, and on two occasions the amount was raised to the legal limit. HHM's bank "kind of shunned demand notes" and did not wish to carry this particular loan at the legal limit except on a temporary basis. The bank president testified that if the bank had called on HHM to pay off the demand notes, he did not know whether HHM could have obtained the money to do so; indeed, he gave it as his belief that, in fact, HHM could not have obtained the money elsewhere to do so (Fdg. 14, R. 565; R. 456-57; 460-61, 468, 470-71).

(e) *The "black box".* Another interesting but hardly orthodox source of financing by HHM during the period in question was its device of preparing and dating checks for its trade creditors at the time that their invoices were approved, but of not releasing the checks until later. In the meantime, they were kept by HHM in what was called the "black box" (R. 579). As a result of this practice a lapse of between 30 and 120 days between the preparation of a check and its issuance and cancellation by the bank was not unusual. In the period of 1959 before the acquisition, at least 100 HHM checks per month cleared the bank in excess of 30 days after the date of the check (Fdg. 18, R. 566; R. 556).

An interesting example of the operation of the "black box" appears in HHM's dealings with Alcoa.

HHM's Treasurer, in person and in correspondence, in December 1958 had solicited Alcoa to extend HHM 90-day credit terms, but Alcoa had declined HHM's request that its "30 days net" credit terms be thus extended. HHM then proceeded, notwithstanding Alcoa's refusal, to effect the extension itself by putting Alcoa's checks in the "black box" and holding them up for periods of close to 90 days (Fdg. 18, R. 566; R. 558-560, 429-430).

It should be noted, in the light of the repeated erroneous statement to the contrary in the Government Brief (pp. 13-14, 41), that these prepared but unissued checks are *not* included in the figures for HHM's overdrafts, and are separate and distinct therefrom. The overdrafts reflected by the Lybrand, Ross audits take into account only checks that were "floated" out of the black box and which had received a first cancellation stamp by a clearing bank. Lybrand, Ross could not certify as to checks in "float" which had not yet cleared a bank and consequently had not yet received a bank cancellation—the only hallmark Lybrand, Ross could rely on to determine beyond question that an HHM check had been in circulation on a date certain. Thus, the Lybrand, Ross reports reflected the *minimum* checks in "float" at any given moment. See note 7, p. 12, *supra;* R. 551-52, 585-86.

9. *HHM's position at the time of the closing.*—By the time of the closing on September 11, 1959, HHM had incurred operating losses for the fiscal year 1960, which had commenced on July 1, 1959, in the amount of $206,953.51 (Fdg. 16, R. 566; R. 222b). As stated, at an annual rate these losses would have exceeded $1,000,000. Furthermore, by the time of the closing, HHM's net

quick asset ratio had declined to .03—its cash and Government securities were equivalent to only 3 percent of its current liabilities (Fdg. 6, R. 563; R. 557). It had a nominal bank balance on the books of its principal depository of $13.92 at the start of September—and even then its checks in the amount of $113,000 were in the hands of its creditors. At the closing, which was in the form of a sale of assets, HHM declined to present a check to Diebold in settlement of its principal bank account on the ground that the account was actually overdrawn on account of outstanding checks. The overdraft on account of outstanding checks on this account as of the day before closing, September 10, was $53,978.59. If, against this deficit, there be credited HHM's smaller positive balances in other banks,[9] HHM on the day before closing had a net overall *deficit* in its bank accounts in the amount of $35,596.61 (Fdgs. 3 and 9, R. 562-64; R. 222b, 231).

As of the closing, HHM had accumulated past-due trade bills, payable dating back prior to January 1959, in the amount of $244,127.68. In addition to these past-due bills, at the closing HHM also had currently due trade bills payable in the amount of $499,833.66 (Fdg. 17, R. 566; R. 222b, 235). This was in the face of a net overdraft position in respect of all its bank accounts. Upon acquiring HHM, in the light of HHM's inability to deliver a check for its principal bank account, and its overdrawn cash position, Diebold immediately commenced advancing cash to HHM. Within the next three weeks it had advanced a total of $500,000 to meet current and past-due obligations of HHM (Fdg. 19, R. 566-67; R. 235). Further cash advances had to be made in later months (R. 265).

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[9] See note 8, p. 13, *supra*.

10. *Disclosures after the closing.*—In the period after the acquisition, the facts concerning HHM's desperate financial condition began to come to light. Diebold then caused audits to be made of HHM's finances, and an operations survey to be made by independent management consultants. This survey by the independent management consultants, proposed in October 1959, and commenced in December of that year, indicated poor supervisory methods, unsound and obsolete design of tooling equipment, and lack of currently-accepted practices of inventory management, production control, and quality control. It found a picture of unsatisfactory labor application and of inflated performance reports, rendered under the prior management, which gave a false picture of the efficiency of the labor application. The report commented that "the manufacturing personnel had been long dominated by a strong-willed individual with an extremely limited manufacturing background" (R. 261). The report's conclusion was that "from a manufacturing standpoint, Herring-Hall-Marvin Safe Company was very poorly organized and operated. It was clearly a high-cost producer and could succeed only as a marginal operation . . . It would be hard pressed to survive under close pricing conditions or in a highly competitive market" (R. 261-62; see Fdg. 21, R. 567-68).

11. *Continued decline in business and continued cash needs.*—After the acquisition the pattern of losses continued, although, of course, now covered by Diebold's cash advances. Operations of the HHM Division of Diebold continued to reflect losses through the first seven months of 1960. These losses culminated in a loss of $106,000 for the month of July 1960. In the eight months ending August 31, 1960, new orders en-

tered by the HHM division declined $2,307,707, or 29.8 percent, from the same eight-month period in 1959. During this period the HHM Division's shipments exceeded its new orders by $449,000. By July 31, 1960, Diebold's cash advances to the HHM Division stood at $840,000, despite the shrinkage of the business (Fdgs. 19, 23, and 24, R. 566-68; R. 264-65).

B. The Government's Proofs With Respect to HHM's Financial Condition

The primary proofs submitted by the Government on the issue of HHM's financial condition were the affidavits of two employees of the Department of Justice. Exhibited to the affidavits, or forming their factual basis, were various undisputed items of public record or in official files, relating to HHM and to other corporations. Furthermore, to a considerable extent these affidavits used as their basic material the proofs filed by Diebold, including the audit reports of the independent public accountants which Diebold had filed.—The affidavits filed by the Government do not reflect any firsthand acquaintance with the company's books and records on the part of the affiants. They were of such a nature as could have been prepared at their authors' desks in Washington.

1. *The Singman Affidavit.*—The first affidavit was one by Milton Singman, an FBI agent and accountant. It recited that it was based upon HHM's published financial statements (which the District Court later found "failed completely to reflect the actually insolvent condition of the company") and upon the independent auditors' special reports filed by Diebold in support of its Motion. The affidavit simply swore to various matters of records, mainly relating to HHM's so-called long-term position, and not related to the

crucial issue of its internal cash condition in 1959, prior to the closing.

Specifically, the affidavit swore to the published earnings figures down through June 30, 1959, which indicated that HHM was showing a profit; to the published figures showing a growth in its retained earnings account (an accounting charge account rather than an asset account, it will be noted);[10] to the annual dividends of less than $12,000 which had been paid throughout the late '50s, and to the book value of the stock; to the company's working capital position, expressed in terms of a ratio which included inventories on an equal footing with cash;[11] and to the company's dwin-

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[10] "Retained earnings" is simply one of the elements on the liability side of the balance sheet, such as actual liabilities, capital, and capital surplus. It of course does not represent any definite assets—which, in the final analysis, must be used to pay bills and meet the payroll.

[11] Even the other Government affiant recognized that such a ratio was not satisfactory. See Neisser affidavit, ¶ 15 (unprinted portion).

The indiscretion of using ratios taking HHM's inventory into account in the 1959 crisis is confirmed by standard treatises on accounting: "A business with a high current ratio might not be in a position to pay current liabilities because of an unfavorable distribution of current assets relating to liquidity. For example, the merchandise inventory may be excessively high in relation to prospective sales; an increase in inventory accompanied by a decrease in sales and accounts receivable may represent an unwarranted accumulation of inventory . . . . An increase in notes payable accompanied by a decrease in business volume may reflect the inability of a company to pay its accounts payable when due, and therefore establish a need for additional working capital." Kennedy, Financial Statements (1947), p. 208.

"In many lines of business, a concern whose current assets consist largely of inventory can very easily become technically, if not actually, insolvent within an incredibly short period of time." Guthmann, Analysis of Financial Statements (1953), p. 109.

dling long-term debt position, without discussion of the demand note character of its debt during the crucial period (R. 331). None of these items threw any light on the company's liquidity position during 1959 which was, of course, the crucial issue in the case.

The affidavit also called attention to the fact that HHM's ratio of expenses to sales was similar, as of June 1959, to that of June 1950, without alluding to the fact that, as discussed by the very reports upon which the affiant relied, HHM's expense ratios had, by 1959, built up severely in the short swing. (Taking fiscal 1957, a year of somewhat larger sales, as a base, the Selling, General and Administrative Expense Ratio, as a percentage of sales, had risen from 17.6 percent to 20.2 percent in fiscal 1959.) (R. 332, 337). The affidavit also compared, on a general basis, average working capital ratios for the late '40s with those of the '50s, lumping together the entire period of 1950 through 1959 without particular focus upon the liquidity situation in 1959 (R. 332).[12] Likewise, the affidavit compared the rate of inventory turnover during the entire period of the '50s with that prevalent during the late '40s, again without calling attention to the fact that, as revealed by the figures on which the affidavit was based, the company's rate of inventory turnover in 1959 had been slowing down steadily for the cycle commencing in 1956 (R. 332, 342). (In 1956, inventory had turned over 6.21 times per year, while by 1958 the figure was down to 5.75 times per year, and in the critical year, 1959, it had dropped to 4.75 times per year.) (R. 342)

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[12] The ratios used again equated inventories with cash. See the comment in note 11, p. 20, *supra*.

In short, the Singman affidavit simply swore to various undisputed facts dealing with the profit and retained earnings accounts as revealed by HHM's published figures, and made certain comparisons in the gross between HHM's performance in the entire period of the post-war '40s on the one hand, and in the entire period of the '50s on the other.[13] It made no effort to focus on the specific issue in the case, which related to the current position of HHM during 1959, despite the fact that part of the underlying figures on which it was based—the special audit reports made from HHM's internal papers—permitted such an analysis. Of course, these figures confirmed the picture of HHM's liquidity plight in 1959.

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[13] Besides those mentioned, Singman drew decade-wide comparisons for the 40's and 50's in respect of current-liability-to-cash-and-receivable ratios, and in respect of the earned surplus account. (See note 10, p. 20, *supra*). (R. 332). He also compared HHM's earnings for its last profitable year with those of other companies in the fabricated metal products industry (R. 333).

Furthermore, through the time-honored device of carefully selecting a base year, the Singman affidavit developed some ratios which are not only *not* representative of HHM's performance but, indeed, grossly conceal HHM's financial deterioration. One example is the Government's assertion that during the period from 1950-59, the ratio of the company's cost of sales and selling and administrative expense to net sales remained about the same (Gov. Br. 11). But Singman's own affidavit makes it clear that net operating profit was down, on an average for the two periods from 7.5% to 4.7%. And, to come to the point of specific relevance to the case, the net operating profit figure had fallen to under 4% in fiscal '59; of course, after the close of fiscal '59, operating losses commenced.

Another example of a dubious use of a base year is presented by the Government's assertion of an increase in HHM's net sales ratio from 1.29 to 4.73 between 1955 and 1959 (Gov. Br. 15). This, as the Neisser affidavit makes clear, is a comparison made by selecting one of HHM's worst years as a base year. If a more representative year, 1956, is taken as a base year, HHM's ratio declined from 6.79 to 4.73 (See R. 337, Neisser affidavit, Table 1 (unprinted portion).)

2. *The Neisser Affidavit.*—The Government also filed an affidavit of Albert Neisser, a business economist in the Antitrurt Division, who was associated in the case with counsel for the Government (R. 599-600). The Neisser affidavit was based upon the Federal income tax returns filed by HHM, by Diebold, and by the Mosler Safe Company, upon certain census reports, and upon certain reports of Dun & Bradstreet, Inc.

Neisser's affidavit, like Singman's, concentrated on a "long view" of the matter, not concerning itself with the details as how HHM could have survived during 1959. Neisser swore to various "conclusions"; one of these conclusions to which he swore was that "before the merger, HHM was in a sound financial condition." (R. 600) No details were provided by the affiant as to how much less than an over-all *negative* bank balance of $35,596.61 a company would have to have before it would be considered to be in an unsound financial condition. Some of the other "conclusions" of the affidavit were (a) that HHM "had had a profitable financial history during the five years preceding the merger" (R. 600)—a conclusion which referred simply to its published profit and loss and balance sheet figures; (b) that "its balance sheet as of June 30, 1959, showed it to be free of long-term debt" (R. 600)—as opposed to short-term demand debt which, unlike long-term debt, was specifically relevant to its current position in 1959; and (c) that "a number of tests applied customarily by accountants and economists revealed that the company had been operated with effective use of its financial resources" (R. 600)—that is, as long as the company made a profit, because of its short working capital position, its ratio of profitability to working capital appeared most impressive, or as the affiant more elegantly

expressed it, HHM had a "capacity for making limited means go a long way." (Neisser aff. ¶ 20 (unprinted portion)).[14]

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[14] The references to the Neisser affidavit by paragraphs are to the unprinted portions of it. (See Gov. Br. 14, n. 10).

Other aspects of the Neisser affidavit indicate a similar approach—that is, a comparative, "long-term" analysis which attempted to show HHM as efficient on the basis that, inasmuch as its working capital was so short, its performance expressed *in terms of a relationship to its working capital*, or related figures, seemed favorable as long as any profit was being shown. The comparisons were on the basis of the five-year period running for HHM, from July 1, 1954 to June 30, 1959.

For example, Neisser dwelt on a so-called favorable ratio of HHM's profits to its *investment in its business*, as compared to that of Diebold and Mosler Safe Company (Paras. 12 and 13). Again, he compared HHM's profits *in relation to its working capital* with those of Diebold and Mosler (Paras. 17 and 18), concluding, understandably enough, that "this comparison of HHM with Diebold and Mosler shows HHM in a very favorable light" (Para. 17). Another comparison infected by the same fallacy was that between HHM's *ratio* of net sales *to net working capital*, and those of Diebold and Mosler (Para. 20).

Similarly, Neisser noted that HHM made "more use of" its current assets than Diebold and Mosler.—This is a euphemistic expression of the fact that its current assets were considerably less in relation to its net sales than were those of Mosler and Diebold (Para. 25).

The one thing in common which these various comparisons used by Neisser have is this. They all are ratios which tend to make a company with a weak working capital position, which is nonetheless showing some profit, appear in a favorable light. They are, accordingly, "fair weather" ratios; but they do not address themselves at all to the problems which HHM had in 1959, about which this case turns. Indeed, a company which performs favorably on the basis of such ratios may, as HHM was, be precisely the sort of company which is unable to weather a financial crisis. Thus, not only do the Neisser comparisons not contradict the fact of HHM's financial crisis in 1959, they in fact suggest the background for that crisis.

Neisser admitted that HHM did not meet the common rule-of-thumb that a company have $1 of current assets (excluding in-

The Neisser affidavit's only discussion of the current position of HHM is simply a critique of Diebold's method of the comparison of HHM's ratios with those of other companies.[15] (R. 602-03). But, in any event, the affidavit pointed to no group of companies in which the net quick asset ratio was nearly as low as 7 percent —HHM's June 1959 figure—let alone 3 percent—HHM's figure at the time of the closing. The Government economist swore further that "similarly, a company that can count among its main customers the Federal Government,[16] the nation's banks, and substantial credit institutions, may well be justified in considering a larger portion of their receivables as liquid

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ventories and prepaid expenses and supplies) for each $1 of current liabilities (Para. 16). As usual, he sought to make a virtue of HHM's thin position by pointing to the high ratio of sales and earnings *in comparison to its working capital* (Para. 17).

Neisser's position on the current ratios of HHM was that HHM should not be compared with any companies other than those "well known for their production of safes and vaults" (R. 602). In line with the Government's theories as to the market in this case, these other companies included, in Neisser's presentation, only Diebold and Mosler. Of course, the figures compared were not restricted to the safe and vault-making functions of each company. In any event, HHM's ratios were grossly inferior to those of Diebold and Mosler as shown by Neisser's own tables. See Tables 5 & 6.

[15] The affiant quarreled with Diebold's inclusion of HHM in the category of a manufacturer of "Other Fabricated Metal Products" (in the classification used in the FTC-SEC "Quarterly Financial Reports for Manufacturing Corporations") (R. 601-03). Yet the other Government affiant used this category for a comparison of HHM. See R. 333. It is clearly an appropriate category. See note 4, p. 9, *supra*.

[16] Neisser's academic speculation that the Federal Government was not "slow pay" does not appear to be borne out by the record of the case. HHM seemed to have particular trouble with its receivables on a type of file manufactured primarily for the Government (R. 360, 558).

assets than a company with large numbers of small firms as customers'"[17] (R. 603). But the affiant did not offer any information as to whether, even in the case of a company so favored, it might not be advisable to have a little more than $13.92 as a bank balance per statement, and to have a somewhat better real cash position than a net overdraft of $35,596.61—HHM's overall position at the time of the closing.

The Neisser affidavit made further general comparisons not specifically related to the critical period between the operating performance of HHM and of Diebold and Mosler through the years.[18] It also referred to a favorable credit rating given HHM by Dun & Bradstreet in March 1959. (R. 602) However, the record did not show that Dun & Bradstreet were privy to the facts disclosed to the District Court, such as, for example, that in March 1959 HHM's critical lack of

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[17] The affiant did not address himself to the question whether it might not be advisable for a company seeking to do business with "the nation's banks" to maintain accounts at a number of them, thereby increasing rather than decreasing its cash requirements. HHM maintained accounts at a number of banks outside of its principal depositary (R. 554-55).

[18] A sample of these comparisons is given in note 14, pp. 24-25, *supra*.

It would have been more meaningful if Neisser had set forth the ratio of gross profit per dollar of sales, a critically important ratio in predicting an enterprise's ability to continue in business. During the period '55 to '59, HHM showed an average gross profit of 31 cents per dollar of sales. During the comparable period, both Diebold and Mosler averaged more than 40 cents gross profit per dollar of sales. Thus, HHM's profit per dollar of sales was 25% less than the companies the Government chose for comparison (R. 599, Neisser affidavit, Exhibits 1-15 (unprinted portion)). This low margin of gross profit clearly indicates that a very small increase in costs could completely wipe out any HHM profits and indeed cause a loss. This is precisely what happened in the summer of 1959.

funds forced it to hold up payment of such substantial accounts as Alcoa for periods ranging up to 90 days (R. 556); and the other revelations made after the closing.

C. The So-Called Alternative Purchasers

The Government claims that there were three non-competing prospective purchasers who were interested in acquiring the business of HHM. The record reveals the following as to them:

1. *Colonel T. C. Davis.*—One Van Ness, an Assistant Treasurer of the Bank of New York, in the spring of 1959 heard through a contact man at Ebasco Services, Inc., that a certain Colonel T. C. Davis "had a continuing interest in attractive investment opportunities" and that he "might have some possible interest in trying to arrange an exchange of HHM stock for that of some company in which Colonel Davis had a present interest." (R. 284) After a phone call to Colonel Davis[19] in which "Colonel Davis indicated he had little knowledge of the HHM Company but that he was always willing to explore an investment possibility", Van Ness wrote Mosman. (R. 284) Van Ness' letter to Mosman purported to be written on behalf of "a group of people with whom we are well acquainted and who are interested in making constructive investments", who had "requested" Van Ness to make inquiries on their behalf. After a few contacts with Mosman, and after informing Mosman that he could not predict whether

[19] The Government refers to Colonel Davis as a "Director of the American Chain & Cable Company" (Gov. Br. 33). Apparently he was, but the record does not support any implication that his contacts with Mosman were on behalf of that company. Neither does the record indicate that VanNess' promotional activities were on behalf of the bank rather than in search of a personal finder's fee for himself.

negotiations with Davis held any promise, Van Ness secured an expression of willingness from Mosman to meet Davis (R. 288). Mosman put off meeting Davis until "after we had closed our books as of June 30, 1959"; his last letter to Davis stated that "we are still in the process of closing our books" (R. 299). Colonel Davis evidently went on a European trip, and no meeting between Davis and Mosman, with its prospects of a request of a disclosure of HHM's books, ever occurred. It does not appear that Davis ever sought any information at all from Mosman in respect to HHM, and notably, no "financial data or operating figures [were] ever supplied to Colonel Davis by Mr. Mosman" (R. 285).

2. *James H. Boyce.*—Mr. Boyce operated out of Baton Rouge, Louisiana, and was connected with various enterprises such as a Baton Rouge machinery sales and service company, a local Ford dealership, and an automobile leasing company. In or about 1958 Boyce became interested in the manufacture and sale of a burglar alarm device (R. 345). Boyce contacted Mosman in the middle of 1958, saw his plant in August, 1958, and had sporadic contact with him for some time in 1959. In all this period Boyce states that "a definite offer was never made" by him for the acquisition of HHM (R. 345).

Boyce's Washington attorney, Cross, sought to promote a deal for HHM by soliciting Hayden, Stone & Co., New York investment bankers, submitting to them a pamphlet outlining a scheme for financing the deal (R. 347). The bulk of the attorney's covering letter was devoted to a discussion of the middleman's fee to be anticipated in such a deal. (R. 347) It also disclosed an attempt to interest, as a possible purchaser,

a Mr. John A. Coakley of the Automatic Sprinkler Corporation of Youngstown, Ohio. The letter requested that, if the pamphlet were presented to Mr. Coakley, "please specifically point out that I have distinctly emphasized the Boyce interest as a matter of psychology" (R. 347-49).

The pamphlet that the prospective middleman had prepared was replete with estimates of projections of HHM's future earnings through 1968 (R. 351-55), although Mosman had never made any disclosure of the real condition of HHM's finances to Boyce or his promoter who prepared it. The solicitation stated that "it should be distinctly understood the following in no way constitutes an offer, but rather a basis for discussion". (R. 348) The pamphlet envisioned that the purchase would be made by a "purchasing group"—not yet formed—and there might then be a flotation of stock to the public (R. 349). The pamphlet stressed that "all items, such as past profits, value of equipment, etc., are subject to verification" and that "the purchaser must have an opportunity and sufficient time for necessary verifications". However, Mosman never opened his books to Boyce or any of his promoters (R. 348-49).

The pamphlet was never brought to Mosman's attention, but Boyce orally mentioned, in discussions which never ripened into an offer and which never brought forth any disclosure on Mosman's part, a plan contemplating debt financing in the sum of $1,500,000, or a long-term lease of HHM's fixed assets and outright acquisition only of the remainder of the business (R. 270, 346).

The memoranda and other documents reflecting the promoters' plans for the deal inevitably contemplated

and required direct bank financing or public stock financing of the transaction, with the concomitant revelations of HHM's condition which such forms of financing would entail. There was no evidence of what effect an accurate disclosure of HHM's condition would have had upon Boyce, upon the "purchasing group" the pamphlet contemplated, upon readers of the prospectus required in a public offering as contemplated, or upon a prospective debt financier of the deal. (R. 345-56, 270-71).

3. *Lovell Manufacturing Company.*—Lovell Manufacturing Company of Erie, Pennsylvania, deals in clothes-wringers and dryers. Representatives of Lovell and HHM had a meeting in April, 1959, at which Mosman mentioned the figure of $3 million in cash. Lovell stated that they were not interested under such circumstances. After the meeting, Lovell wrote HHM: "You can expect to hear further from us within the next few weeks regarding some preliminary ideas concerning the matters which we discussed." Nothing of significance, including even any revelation of the "preliminary ideas", seems to have ensued (R. 270, 272-74).

* * *

The District Court found that these three interests (Van Ness-Davis; Cross-Boyce, et al.; and Lovell) were but "promoters" who made no actual offer for HHM. It further found that HHM's condition dictated that it make a quick sale without exhaustive analysis of its books and records, and that Diebold was the only bona fide prospective purchaser (Fdgs. 29, 30; R. 569).

D. The Parties' Conduct as Reflecting Upon the Financial Condition of HHM

This section reviews the record in respect of the Government's repeated insinuation that the raising of the failing company issue was some sort of afterthought. (Gov. Br. 4, 6, 17-18). With one exception,[20] Diebold, at the time of the closing, did not know the specific facts concerning HHM's desperate financial condition (R. 11; 222a-e, 262-63). The District Court so found (Fdg. 16, 17, 18, 21, 29; R. 566-69). While Diebold was shown an inaccurate (even as orally amended) interim balance sheet for April 30, 1959, it received no further figures from Mosman. Thus, Diebold was ignorant of the interesting practices with respect to the making up of HHM's earnings' statements and balance sheets; of the details of HHM's working capital position; of the commencement of heavy operating losses on the part of HHM; of the "black box" procedure for misdating checks and egregiously slow payment of HHM's trade accounts; of the habitual overdraft condition of HHM; and of the creation of fictitious balances through account transfers. Nor did Diebold have any indication of the further deterioration in HHM's condition that had set in during the summer of 1959, when actual operating losses commenced.

During the summer of 1959, Mosman was engaged in attempting to obtain a renegotiation of the contract to obtain slightly better terms of sale, including terms

[20] The exception is simply that in May 1959 Mosman told Diebold that on the uncertified HHM April 30, 1959 interim balance sheet, he had reclassified $100,000 of receivables as cash (R. 222a). As the Statement of Facts makes plain, this was hardly even Chapter One in a complete financial story of HHM, and it was very far from being exhaustive of even the misstatements inherent in the April 30 balance sheet. See R. 222a-e.

particularly favorable to him to the exclusion of the minority shareholders of HHM. Diebold, upon Mosman's threat to break the contract, reluctantly acceded to his demands, which increased the purchase price by a small fraction of one percent[21] (R. 10-11).

The Complaint and Motion for Preliminary Injunction were filed in August 1959, before the closing of the sale. The Preliminary Injunction Motion was opposed in early September 1959, also before the closing. As the Government points out, in his affidavit and deposition taken before the closing, Mosman, the seller, made no reference to the dire financial condition of HHM, the property he was selling. Neither did Diebold then allude to HHM's financial condition for the simple reason, as the District Court later found, that it did not then possess any particular information in regard to it.[22]

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[21] The only extra consideration which came to have an actual cost was the payment of certain personal expenses of Mosman, in the context of a $3,000,000 acquisition (R. 10-11).

[22] The Government makes some point of the fact that in its Answer, filed five days after the closing, Diebold made no reference to the financial condition of HHM. But the record is clear that the full picture of HHM's true condition was not one which could be learned in a matter of days. Moreover, and more pertinently, Diebold's Answer (R. 158-59) was a short-form answer essentially in the form of a general denial of the material allegations of the Complaint; the Government does not suggest that the "failing company" issue is a matter that must be raised as an affirmative defense in the Answer.

It was only upon the discovery of such internal working papers as Mosman's Treasurer's worksheets for the management of his overdrafts (R. 468-70) that Diebold became fully aware of what had been happening.

These papers were discovered and copies furnished to the Government in the early part of 1960 (R. 202, 207). The failing company issue in this case thus considerably antedated the date at which the Government places it (Gov. Br. 5-6).

In short, Mosman did not publicly advertise HHM as a failing company. Neither did, we hasten to add, Diebold purchase it on the basis that it was. HHM was, however, as later examination revealed to Diebold's regret, as the proofs submitted on the Motion for Summary Judgment unquestionably made out, and as the District Court found, *in fact*, a failing company at the time of its acquisition by Diebold.

SUMMARY OF ARGUMENT

I.

A. HHM was so hopelessly insolvent at the time of its acquisition by Diebold that its acquisition could not be considered prejudicial to the public or as substantially lessening competition. Thus, under the rule of *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930), the acquisition could not be deemed to violate § 7 of the Clayton Act. The rule of the *International Shoe* case applies to companies which find themselves in a failing condition on account of rapid deterioration of their current liquidity positions, as well as those which suffer from long-term declines.

B. Congress ratified the *International Shoe* doctrine in enacting the 1950 revision of § 7, and it made it plain that the doctrine's application was broader than simply to cases of technical bankruptcy. The doctrine has been consistently applied by the courts and in the practical administration of the antitrust laws, and its soundness is not questioned by the Government in this case.

C. HHM was in a current crisis of such a nature throughout 1959 as to bring it within the *International Shoe* doctrine. A shrinkage of sales, coupled with an increase of costs commencing in 1957, taken with its

continually thin working capital position, had weakened it financially. Its condition worsened tremendously in 1959, with the signing of an unfavorable union contract and with the commencement of actual operating losses. Its book figures and statements had for years not reflected its actual condition, and practices of a bizarre nature were adopted in 1959. The company was chronically overdrawn, even on its payroll account. It engaged in transactions to create fictitious bank balances. It used a "black box" procedure to delay its creditors. Its cash sunk to 3 percent of its current liabilities. It accumulated heavy overdue bills and was heavily indebted to its bank on a demand-note basis. By the time of the acquisition, it was obvious that HHM never could have worked itself out of its current position, and its subsequent history underscores the fact that a further deterioration, which would have been fatal, was about to ensue.

The Government's proofs on the question of HHM's financial condition do not touch the specifics of its massive failure of liquidity in 1959. They went largely to its "long-term" condition—that is, based on HHM's published figures, they expressed what its prospects would be in the long-run, assuming that nothing happened in the short-run that prevented the company's survival. This presentation was simply irrelevant to the basic issue in the case—the question of HHM's survival in 1959.

II.

There were no parties other than Diebold who offered realistic, live alternatives to the sale that was in fact effected. The individuals whom the Government points to in this respect are will-of-the-wisps, heavily involved

with promoters and middlemen, none of whom ever considered himself to have made a definite offer for HHM. At the least, their contacts with HHM were slight, and at the most, desultory. None of the figures in question were afforded access to HHM's internal books; clearly, none would have been interested in HHM if they had; yet none expressed an interest in buying without financial verifications. As a practical matter, none of these figures was a real alternative purchaser for HHM under the circumstances. There was no alternative, other than liquidation, to the sale of HHM to Diebold.

III.

The use of summary judgment was appropriate in this case where, after extensive discovery had been had by the Government, the issues turned on financial data as easily established on a summary judgment motion as through an identifying witness. The narrow issue determined by the Court under § 7 did not pose questions of conspiracy or intent, but simply an issue of a nature as to which this Court has approved summary judgment in civil antitrust litigation. The record is devoid of a genuine conflict as to a material fact. At issue are matters solely of conclusion from the record. The record as to one issue of intent as to which the Government now claims a conflict, is in fact free therefrom; and the "issue" was never raised before the appeal to this Court. The record, accordingly, was ripe for a summary judgment on the "failing company" issue, which obviated time-consuming further discovery, and obviated an unnecessary lengthy trial on the tangled issues of the relevant line of commerce and of the general effect of the acquisition upon competition.

ARGUMENT

I. HHM WAS WITHIN THE INTERNATIONAL SHOE DOCTRINE AT THE TIME OF ITS ACQUISITION BY DIEBOLD

A. *The International Shoe doctrine.*—In *International Shoe Co.* v. *FTC,* 280 U.S. 291 (1930), the Supreme Court, reversing an FTC finding of a violation of § 7, enunciated the following very practical doctrine:

> "In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law . . . would 'seem a distempered view of purchase and result.' " (280 U.S., at 302-03.)

This principle has ever since been styled the "failing company" doctrine. The establishment, on the facts of a given case, that the acquired firm was a "failing company", avoids a charge that its acquisition violates § 7 of the Clayton Act.

The facts of the *International Shoe* case indicate a type of failing condition which has a substantial similarity to the facts at bar. The failing company in the *International Shoe* case, the McElwane Company, was

not sold under judicial process or with any loss to its creditors. Rather, as here, its purchaser assumed its business liabilities which were then, so far as the record indicates, paid in full. Over and above this, there, as here, some consideration was paid the seller in respect of the equity in the business on account of the company's long-term prospects—the acquiring company in *International Shoe* gave its own stock in the market value of $9,460,000 for the stock of McElwane Company. The precise aspect in which McElwane was found to be a failing company was in regard to its current position—"the company had reached the point where it could no longer pay its debts as they became due",[23] 280 U.S., at 300. The McElwane Company's current position in the years in question—the depressed shoe business of 1920-21—was (despite its "long-term" prospects) the specific aspect in which this Court found it to be a failing company.

B. *Ratification of the International Shoe doctrine in the Amended* § 7.—While the *International Shoe* decision was rendered under the original § 7 of the Clayton Act, the legislative history of the 1950 revision of § 7 makes it perfectly plain that Congress intended the doctrine to be available on the same terms under the Act as amended. The Senate Report declares:

> "*Companies in a failing or bankrupt condition:*
>
> "The argument has been made that the proposed bill, if passed, would have the effect of preventing

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[23] It might be noted, apropos of the Government's overly strict statement of the failing company standard, that in *International Shoe* there had not even been a complete cessation of dividends on the part of the acquired company. See 280 U.S., at 300. It should be noted that the Government repeatedly chooses to mention the fact that, up to and including the fiscal year commencing July 1, 1958, HHM continued to pay a quarterly dividend amounting to an annual amount of less than $12,000 (Gov. Br. 11-12).

a company which is in a *failing* or bankrupt condition from selling out.

"The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.

"The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that *a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue.*" (Quoting from *International Shoe*) (Sen. Rep. No. 1775, 81st Cong., 2d Sess. (1950), p. 7, emphasis supplied.)

And the House Report:

"The argument that a corporation in bankrupt or *failing* condition might not be allowed to sell to *a competitor* has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases. *In the . . . [International Shoe* case] *the Supreme Court went much further . . .*" (quoting) (H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949), p. 6, emphasis supplied).

This legislative history makes it plain that the doctrine is not simply one that applies in conditions of actual bankruptcy or insolvency: "It is sufficient that (the acquired company) is heading in that direction with the probability that bankruptcy will ensue." (Sen. Rep. No. 1175, *supra.*) However, it is apparent from the record that HHM's condition was, by the

time of the acquisition, one of strict insolvency—lack of ability to pay its debts in due course;—and that even the overly-strict verbalization of the doctrine found in the Government's Brief (pp. 22-23, 25-26), would apply to it. Nevertheless, although the point is hardly necessary for decision here, we think the quoted legislative history clearly indicates a broader scope for the doctrine than suggested by the Government, and that this legislative mood of Congress should be taken into account in any statement of the law on the subject. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487 (1951).[24]

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[24] The Government weakly suggests (Gov. Br. 22, n. 12) that the "failing company" doctrine may not be available where the complaint includes a charge that an acquisition tends "to create a monopoly." The short answer is that the legislative history of the amended Section 7 is unqualified as to the general availability of the doctrine. Moreover, essentially the same logical reasons that gave rise to the enunciation of the doctrine in the *International Shoe* case would support it even if the charge were that of a tendency to create a monopoly. *Cf.* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 340 (1960).

The Government's implication (Gov. Br. 22) that there is a monopoly issue presented by the facts of the present case, is of course a result of its continued fallacious approach to the definition of the market here. Both Diebold and HHM are basically fabricators of steel engaged in the manufacture and processing of a diverse line of metal equipment (R. 15-20). There are innumerable competitors of Diebold and HHM (R. 16-25). In fact, the definition of "relevant market" is a question of bewildering complexity here. Bank equipment is largely indistinguishable from office equipment generally, and the largest companies in the field, such as Sperry Rand and Shaw-Walker, manufacture a general line of safes and office equipment used by banks. An equally large portion of Diebold's annual business is general office equipment designed alike for insurance companies, municipal offices, factory offices and banks (R. 15-25, 123-25, 128-29, 137-40, 527, 539-40). Government counsel admitted that "It's not a one-

The basic doctrine of the *International Shoe* case is a well-established one, and we note that the Government makes no attack on it here—although it disputes the factual conclusions of the District Court. "This doctrine [the failing company doctrine] has been consistently followed in the litigated cases and has been applied by the enforcement agencies in their merger clearance procedures." Comment, 68 Yale L. J. 1627, 1662 (1959). For example, the Department of Justice has approved the merger of United Press and International News Service under the *International Shoe* doctrine (see 1 CCH Trade Reg. Rep. ¶4207.105 (1958)), and has acquiesced in the acquisition of the only other daily newspaper in New Orleans by the New Orleans Times-Picayune (see III Antitrust Bulletin, No. 5, p. 594 (1958)). The doctrine has also been consistently applied by the Courts and by the Federal Trade Commission, through a process of analysis of the varying financial facts involved in various specific situations.[25]

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product situation. It's not a ten-product situation. It's a many product situation, and it's complicated" (R. 201). Diebold's position is that there are numerous companies producing for its markets, many of them far larger than operations the size of HHM and Diebold (R. 16-22, 137, 540-49).

[25] See *Erie Sand & Gravel Co.* v. *FTC*, 291 F. 2d 279, 280-81 (3d Cir. 1961); *Crown-Zellerbach Corp.* v. *FTC*, 296 F. 2d 800, 831-32 (9th Cir. 1961); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 565 n. 44 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961); *United States* v. *Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 799, 808-09 (D.D.C. 1958); *Pillsbury Co.*, 1960-61 F.T.C. Cases ¶ 29,277; *Farm Journal, Inc.*, 53 F.T.C. 26, 47-48 (1956).

The Government quotes bits of the Courts' factual analyses in these other cases (Gov. Br. 30-31, 34). But, the issues being essentially factual, the question is simply one of analysis of the record of the particular case at bar. *Cf. Commissioner* v. *Duberstein*, 363 U.S. 278, 289-90 (1960).

C. *HHM was, in fact, a Failing Company at the Time of Its Acquisition by Diebold.*—1. At the time of its acquisition by Diebold, the undisputed facts of record conclusively established that HHM was insolvent in the "commercial" or "equity" sense—it was unable to pay its debts in the ordinary course of trade as they fell due.[26] Moreover, its condition was deteriorating; it incurred operating losses of $206,000 between July 1, 1959 and September 10, 1959 (the date of the sale)—an amount larger than its net profit of $186,000 for the entire fiscal year July 1, 1958-June 30, 1959. Its post-acquisition experience amply confirmed its deteriorating position.

The Government does not dispute the essential facts which led the District Court to this conclusion: The company's history was one of always inadequate working capital. 1959 was the second year in a reversal of the growth trend which had supported the company during the '50s (R. 266, 563). The company had always been incapable of adequate internal cash generation (R. 266-67, 562-63). In the spring of 1959, it was saddled with a high-cost Union contract (R. 267, 565-66). Throughout 1959 its essential liquidity ratios drifted lower (R. 256, 267, 557, 563). It began to resort to questionable financial practices in order to maintain a semblance of financial soundness. It arbitrarily held up payment of its trade accounts (R. 429-30, 556, 558-60, 566). It created fictitious balances in its bank accounts through manipulative transactions (R. 554-55, 565). Its debt, all that its bank could law-

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[26] This is the most common use of the term "insolvency." See MacLachlan, Bankruptcy (1956), § 13; cf. Guthmann, Analysis of Financial Statements (1953), p. 64.

fully give it, was heavily current in nature—in fact payable on demand—making its liquidity position even more critical (R. 456-57, 460-61, 565). It consistently and habitually sent out checks to its creditors, and even to its payroll employees, without sufficient funds in its bank to cover them (R. 222c, 223-24, 233). It frequently had a negative real cash position (R. 223-24). It made use of the "black box" technique to delay payment to its creditors (R. 556).

During the summer of 1959, after these conditions had prevailed for several months, operating losses of a heavy nature—at least 10 percent on annual sales—commenced (R. 222b). Even the company's bank balance per statement drifted lower. Its principal balance reached $13.92 shortly before the closing and, in fact, outstanding checks at the time of the closing created a net overall deficit in all of HHM's bank accounts in excess of $35,000 (R. 222b, 231, 562-64). It could not tender a check in settlement of its principal bank account at the closing—being in fact grossly overdrawn on that account (R. 222b). Its net quick ratio had dropped to .03 (R. 557). At the time of closing, the company had past-due bills payable in the amount of roughly $250,000 and currently due bills in the amount of $500.000—roughly three quarters of a million dollars in all (R. 222b, 235, 566).

The company's fortunes did not improve after the acquisition; operating losses continued; infusions of cash to the extent of $840,000 were pumped into HHM; yet orders declined severely (R. 264-65, 557-58, 566-69).

Despite this unquestioned showing—unquestioned except for one patent misstatement of the record by

the Government[27]—the Government claims it is "pure hyperbole" to find, as the District Court did on the basis of the extensive proofs before it, that HHM was "hopelessly insolvent and faced with imminent receivership" (Gov. Br. 30). Rather, the Government alleges that a company in this condition—with a negative bank account and $250,000 in overdue bills payable—"was, according to the customary indicia of business health, in a sound condition" (Gov. Br. 24). We leave it to the Court to decide where the hyperbole lies, and whether the Government's notion of soundness comports with reality.

The Government's Brief is strangely silent on the essential question in the case: How a company in HHM's plight during the summer of 1959 could have survived without merger. It was not able to pay its bills as they matured; it was habitually overdrawn on its bank accounts; its sales were stagnating, thereby imperiling the continuation of its receivables; and its past-due trade debt was $250,000, with an even more substantial current debt payable. Moreover, the company was at the time of acquisition, as events proved, not headed for an improvement in its business, but for even worse times.

Under these circumstances it was evident—and the Government suggests no other alternative—that HHM's condition was such "as to necessitate liquidation or sale" (*International Shoe*, 280 U.S., at 294); that it was "a corporation in failing circumstances, the

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[27] This is the Government's statement that Diebold's figures as to HHM's overdrafts may include amounts for checks which had not been issued by HHM. As we have explained, p. 16, and note 7, p. 12, *supra*, this is simply not the case.

recovery of which to a normal position was, to say the least, in gravest doubt" (*Id.*, at 301); and that it was "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" (*Id.*, at 302). These are the very passages of the *International Shoe* opinion which the Government (Gov. Br. 26) sets forth as stating the governing rule of that case; and we submit that the facts at bar clearly present such a picture.

2. In an effort to avoid the impact of the undisputed facts of HHM's condition in 1959, the Government resorts to two approaches. (a). First, it engages in a laborious process of color-matching in which it contrasts the dollar figures relating to the McElwane Company's condition in the *International Shoe* case with those of HHM (Gov. Br. 26-27). Obviously, such a comparison in quantitative terms is pointless. Clearly the McElwane Company was a much larger operation than HHM and, accordingly, its figures for operating losses, bank debt, and trade debt were considerably larger than HHM's: witness the fact that for this company, albeit failing, International gave up stock worth $9,460,000. Again, the precise pattern in which two companies fail is hardly ever likely to be identical; for example, the McElwane Company does not appear to have resorted to any of the extraordinary practices carried on by HHM with respect to its finances. The essential focus of inquiry clearly should be in terms of the facts of the particular financial pathology in question in each case. On the basis of such an inquiry, it is abundantly clear that there was no apparent way in which HHM could have survived as a going concern, and that it faced the grave probability of a business failure.

Moreover, as to the general pattern of the two failures, there is a considerable parallel, as we have indicated, between the situation involved in *International Shoe* and that involved here. Both cases involved companies with some so-called "long-term" prospects. After making an audit of McElwane's books (see 29 F. 2d 518, 521), International Shoe paid close to $10 million for it, and was forced to discharge its liabilities in the due course of trade; and here, albeit without investigation of HHM's books, Diebold paid $3 million for it. — But the crisis in which each acquired company found itself, and which this Court in the *International Shoe* case, and the District Court in this case, found created the "grave probability of a business failure", related to the acquired company's current position in a period of crisis.

(b). The Government's second approach is to stress the long-term performance of HHM. In this showing, as we have indicated, it resorts to such techniques as gross comparison of the entire decade of the '50s with the years of the late '40s; to comparisons, based on census reports, of operating efficiency with that of other companies; and to various other "long-term" financial figures.[28]

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[28] With respect to the Government's general approach, stressing the long-term showing of HHM in terms of its sales volume and its "efficient use" of its working capital—that is, its frequent turnover of capital relative to sales and earnings—a Government publication gives an excellent capsule description of the sort of financial difficulty which will result when such a "long term picture" turns sour in the short run:

> "Somewhat more difficult to see are potential dangers that arise when a business has too great a turnover of its working capital, when too large a volume of business is being supported by its working capital. The business may be very

But the "long term" means very little to a company which will not survive to enjoy it. — The fact of the matter, which the District Court apprehended but which the appellant has not, is that where the issue is the survival of a company beset by a current crisis, data as to the "long view" is not relevant. It is not something which can be put upon the judicial scales and "weighed" together with the facts relating to the current crisis. If the current crisis is not surmounted, the long view means nothing. — With all due respect, it is a financial absurdity to refer to a company as "financially sound" (Gov. Br. 24, 39), when it has a negative cash balance, heavy overdue trade debts, and is undergoing current operating losses, simply on the basis that in preceding years it may have registered figures which appear impressive in the light of a desk-top analysis. The Government's proofs were totally unrelated to HHM's financial crisis in the summer of 1959; and in the days preceding the acquisition. Clearly, the District Court, on the undisputed facts, correctly found that HHM was hopelessly insolvent in 1959, that it faced imminent receivership, and that because of its percarious financial condition could not have long survived as an independent competitor in its lines of business.

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profitable, further obscuring any danger. It should be emphasized that when sales are supported by an inadequate working capital, the very delicate balance of incoming and outgoing funds that results is easily upset with any interruption in the flow of funds, such as the sudden loss of sales or poor collection performance." U. S. Department of Commerce, Guides for Business Analysis and Profit Evaluation (1959), p. 17.

II. THERE WERE NO REAL ALTERNATIVES, SHORT OF BUSINESS FAILURE, TO THE ACQUISITION OF HHM BY DIEBOLD

A. The So-Called Alternative Purchasers

1. The Government contends that there were three non-competing "prospective purchasers", alternative to Diebold, who were interested in acquiring the business of HHM. The Government suggests that this contention has relevance to the issue in this case on two separate theories.[29] *Firstly*, it suggests that the willingness of these other persons to "invest in" the business of HHM "strongly 'suggests that the hopelessness of its position may [have been] open to question and that new capital and new methods [might have been] applied to improve the situation.'" (Quoting Bok, *Section 7 of the Clayton Act and The Merging of Law and Economics*, 74 Harv. L. Rev. 226, 345 (1960)). In other words, "the existence of other prospective pur-

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[29] A commentator frequently relied upon by the Government (Gov. Br. 22, 31, 32) makes it quite clear that it is not established that the existence of alternative purchasers has anything to do with the failing company issue. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 344 (1960). It might well be argued that the sole question in the case is whether the uncontradicted facts demonstrated that at the time of its acquisition HHM was a failing company. The doctrine of *International Shoe* may well mean that at the point where a company is shown to be failing, concern thereafter is wholly for the benefit of creditors, employees, and stockholders of the failing company and the community its serves. The Government does not here, and never has, contested the proposition that a court in receivership or bankruptcy proceedings is entitled to dispose of the assets to the highest bidder. Similarly, the question here might well be taken to be whether, in fact, HHM was in such a failing condition as to remove its acquisition from the thrust of § 7. However, our position is simply that on the facts of the present case the Court need not reach any question as to the implications of the existence of *real* alternative purchasers, offering live alternatives to the acquisition made.

chasers may . . . show that the company is not 'failing'." (Gov. Br. 31).

But obviously no such conclusion can follow in this case, even assuming a serious interest on the part of the so-called alternative purchasers to whom the Government has reference. This is because the record clearly demonstrates that none of the three parties in question had the slightest idea of what the actual financial condition of HHM was in 1959. Therefore, any interest they may have indicated in "investing in" HHM certainly is no evidence contradicting the clear record of HHM's desperate financial plight in the summer of 1959, as later disclosed.

2. The Government alternatively suggests, *secondly*, that the existence of other prospective purchasers "may require the rejection of the [failing company] defense without regard to the firm's financial position." (Gov. Br. 31). This is because, in the Government's theory, the acquisition and operation of HHM by a non-competing alternative purchaser would have permitted the firm to continue as a competitive factor. From this, the Government argues (in contradiction to a position it has taken administratively),[30] that

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[30] When the *New Orleans Times-Picayune* acquired the *New Orleans Item*, there was included a provision for a resale to any potential noncompeting buyer by the acquiring company, if such a noncompeting buyer could be found within 60 days. However, the alternative, noncompeting buyer would be required to buy at the purchase price of $3,400,000 paid by the *Times-Picayune*, plus expenses of up to $75,000. "In announcing the acquisition it was stated that the Justice Department had reviewed the transaction and acquiesced. . . . In the event that a buyer does not appear, the *Item* will be combined with its competitor, the *New Orleans States* [owned by the *Times-Picayune*]." III Antitrust Bulletin, No. 5, p. 594 (1958).

"where such a sale is possible, the acquisition of the company by a competitor, even at a higher price, may violate section 7." (Gov. Br. 32). Clearly, as to this point, there must be more than a mere showing of "interest" by parties other than the acquiring firm; it should appear that there were live possibilities of sale to alternative purchasers, at the time of the financial crisis.

The uncontroverted facts of record here do not furnish any basis for the application of this legal theory of the Government, even assuming its validity. The record is clear that none of the three "interests" in question ever considered that it had made a definite offer for the business of HHM. Their "interest" seems to have been primarily the product of the promotions of middlemen; and, except in the case of Boyce, even the activities of the middlemen were not extensive. Certainly none of them presented a live possibility of being an alternative purchaser to Diebold in HHM's financial crisis in 1959:

(a) Colonel T. C. Davis' "interest" was clearly the result, as revealed by the record, of the promotional efforts of a prospective middleman—an assistant treasurer of the Bank of New York. The record clearly reveals that the contacts between Colonel Davis and Mosman, although pushed by Van Ness, were never strongly pursued on either side by the putative parties. It hardly reveals any serious expression of interest by Davis. And the record makes clear Mosman's unwillingness to make his books available to Davis—he delayed one meeting on the representation that the company was still closing its books—and there never, in fact, was any disclosure of HHM's financial position by Mosman to Davis. (R. 274-81, 283-88).

(b) While Boyce's contacts with Mosman were somewhat more extensive, he, too, swore that he never made an offer for HHM. In Boyce's case, a prospective middleman, envisaging a finder's fee in excess of $100,000, prepared an extensive pamphlet on HHM's financial prospects, replete with hypothetical projections through 1968,—and obviously constructed in the heat of imagination, inasmuch as Mosman had not permitted access to his books to the author of the pamphlet. Boyce's "interest" was linked, in this pamphlet, with that of a "purchasing group"—which had not been formed; and a public stock offering was also contemplated as part of the promotion of the deal. Boyce's "interest" was emphasized, in the promotional material by the middleman, "as a matter of psychology," in dealing with him (R. 347).

The circumstance that stamps the Boyce "interest" in HHM with the final certificate of unreality is, of course, the fact that no disclosure of the real financial condition of HHM was made by Mosman to Boyce or to the promoters associated with him.[31] This, despite the fact that Boyce's contacts with Mosman dragged on for over a year (R. 345). It must be remembered that before the consummation of a deal commenced on such a basis, a "purchasing group" which had not yet been formed, there would have to be actual financial studies and verifications made of the company to be acquired. Indeed, the one realistic note in the otherwise imaginative promotional pamphlet stressed (R. 348):

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[31] Boyce, like Diebold, was permitted a look at HHM's physical facilities (R. 8-9, 345). The physical facilities were of particular importance to Diebold's needs (R. 13-14; R. 361), but the financial side of HHM—which the Boyce "syndicate's" promoters never saw—was evidently of primary importance to them (R. 348, 351-56).

> It should be distinctly understood the following in no way constitutes an offer, but rather a basis for discussion.
>
> . . .
>
> The purchaser must have an opportunity and sufficient time for necessary verifications and to supply a firm proposal, . . .

And of course disclosure of financial data would be required with respect to the contemplated public stock offering. What the effect of an accurate financial picture of HHM would have been on such a purchasing syndicate and upon a public stock offering is obvious.

The nub of the matter is that the Boyce "syndicate," assuming that it ever came into a stage of completed formation, would not have had any interest in purchasing a failing company; their promoters, in their ignorance, had no thought that this was what HHM was; and public stock offerings to finance acquisitions at near insolvency sales are somewhat rare. Boyce's "group", unlike Diebold, would (as it stated) only have purchased HHM on the basis of a full financial disclosure and verification (R. 348); but a full disclosure obviously would have been fatal to the sale. In short, it cannot be said that sale to Boyce *et al.*, would have been a live possibility on the only basis—full financial disclosure—on which they indicated interest.

(c) We note that the Government scarcely presses its argument (Gov. Br. 32-33) that the clothes wringer and drier firm, Lovell Manufacturing Company, was a serious "alternative purchaser". This company appears never to have followed up an original contact with Mosman (R. 270, 272-74). It, of course, like the others, was never allowed access to HHM's books.

3. The Government observes that "acquisitions of major industrial concerns necessarily involve exploratory discussions and investigations, and a prospective purchaser is no less 'available' or 'bona fide' because he has not yet reached the point of making a firm offer." (Gov. Br. 34). But it must also be recognized as a fact of life that in the business world there are many, many more "expressions of interest" and "feelers" as to acquisitions than there are serious considerations of such purchases. As the Court below noted out of the wealth of its experience in reorganization cases, there is many an expression of hope but few concrete offers (R. 327).

And, in any realistic consideration, the activities of those individuals so evocatively termed "finders" must be taken into account; their presence, certainly apparent on the present record, greatly increases the number of acquisition "feelers", not of a serious nature, in the every-day business world. Accordingly, it would confound common experience to regard every person making an "expression of interest" as a serious alternative purchaser in considering a failing-company issue in a Section 7 case.[32]

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[32] Moreover, in view of the difficulties of running down such will-of-the-wisps at trial, and the practical difficulties inherent in the failing company's approach to potential acquirers, see Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 346 (1960), there should be a strong policy supporting judicial consideration only of alternatives of considerably more solidity than those revealed here. As a commentator has pointed out, it is hard for the acquired firm to be "severed from the defendant months or even years after the merger on the strength of an offer which may no longer be outstanding." (*Ibid.*) It is even harder for it to be severed on the basis of some nearly forgotten "expression of interest" on the part of a promoter.

The Government, in an effort to explain the lack of alternative firm offers to Diebold's for HHM, suggests (Gov. Br. 34) that in view of the fact that Mosman never furnished any of the three interests in question with financial data or operating figures, "it is hardly surprising that no other firm offers [than Diebold's] were made". The obvious answer to this observation is that the furnishing of such data or figures—the figures being what they were during 1959—would hardly have been a stimulant to a firm offer on the part of any of the three interests involved, or to the outside financing institutions on which parties of such a nature obviously would have had to depend. Despite the above-quoted language, the Government can scarcely contend that the revelations that HHM was unable to pay its bills in the due course of business; that it was heavily overdrawn on its bank accounts; that it was engaging in transactions to create fictitious bank balances; and that it had commenced to incur operating losses, would have been a stimulant to the closing of a deal with any of the three interests in question.

* * *

Accordingly, it is clear that the District Court correctly found that "the facts concerning HHM's true financial condition were never disclosed to Diebold or to any of the promoters [the so-called alternative purchasers]. HHM's opportunity to achieve a sale on the terms it sought, and obtained from Diebold, was contingent upon the swift conclusion of a sale without exhaustive analysis of its books and records . . . Diebold was the only bona fide prospective purchaser for HHM's business." (Fdgs. 29-30, R. 569).

B. Alternative Means of Maintaining HHM's Business

As we have noted, the Government has not come forward with any suggestion of a serious alternative to the acquisition of HHM's assets by Diebold, as an escape from business failure for HHM. In lieu of such a showing, it reverts to a process of "color matching" of certain of the factual details in this case against the factual details of the *International Shoe* case. The Government stresses the fact that in *International Shoe*, there were among the officers of the company, as they later testified, lengthy discussions of the alternatives to sale (Gov. Br. 35-36). There were, the Government points out, no such "discussions" here. And obviously not; the record is clear that HHM was, in effect, a one-man operation—that of Warren Mosman who owned 90 percent of its stock (R. 25). The record, however, reveals that Mosman considered liquidation in 1959, and seriously considered recommending liquidation to the Board of Directors; a recommendation which, in view of the fact that the Board consisted of his subordinate employees, would doubtless have met with affirmative action. Clearly, the question whether the condition of a company is such that it is in danger of disappearance, unless bought out, is not one that can be decided on the basis of how much its officers talk about the matter.

The Government, apparently as probative of some element of its case, also refers to the fact that Mosman did not discuss HHM's failing condition with Diebold before the closing; Mosman stated only, at this stage, that his motive for selling was not HHM's financial condition but tax considerations and other personal considerations (Gov. Br. 37). In view of the fact that Diebold bought HHM without disclosure of its

financial condition, we trust it will not be taken as an expression of cynicism to say that it was obvious why Mosman did not reveal its condition at this time.

* * *

In summary, the Government has articulated no serious alternative to an acquisition of HHM as a method of its surviving the 1959 crisis. Speculations as to alternative possibilities here, we submit, would be even less substantial and more pointless than the afterthought alternatives to an outright sale, which were raised in the *International Shoe* case and which this Court declared were matters as to which "one guess is as good as another" and which might "be dismissed as lying wholly within the realm of speculation." (280 U.S., at 301).

III. THE USE OF SUMMARY JUDGMENT WAS PROPER IN THIS CASE

As a subsidiary point, after considerable argument to the effect that the record dictated a finding in its favor on the failing company issue as a matter of law on the undisputed facts,[33] the Government contends that "even if we are wrong," (Gov. Br. 39), the Court below erred in entering summary judgment.

A. The Government does not take the position that a resolution of the "failing company" issue before plenary trial of the remaining § 7 issues, such as was

[33] The Government's position appears to be technically incorrect. Even if HHM had not been strictly within the rule of the *International Shoe* case, but simply in an unhealthy state of finances not amounting to "failing company" status, there would appear no reason why Diebold should be precluded from showing, upon the trial of the action, all the financial facts as to HHM's impaired condition which might be relevant to an informed determination of the effect of the acquisition upon competition.

employed in the present case, is generally inappropriate. Obviously such a preliminary resolution of a "failing company" issue, either by way of summary judgment, or by way of a separate, partial trial devoted to the issue, will often be indicated by sound judicial administration in the context of the antitrust "big case".[34] In fact, the Government has, on occasion, consented to the use of such a preliminary procedure, by way of partial trial, for the resolution of a "failing company" issue. See *United States* v. *Cunningham Drug Stores, Inc.*, Civil No. 20266, E.D. Mich., Stipulation and Order filed May 16, 1961.[35]

B. The Government's contention appears simply to be that the vehicle of summary judgment was inappropriate for the resolution of the "failing company" issue in this antitrust case. In this context it cites the recent decision of this Court in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). *Poller*, to be sure, reaffirms the salutary principle that issues of conspiracy and of intent in an antitrust case are not readily resolvable on a Motion for Summary Judgment. But of course *Poller* does not hold—nor could it have held in the light of Rule 56—that summary judgment procedures are without applicability in antitrust cases. Where the question presented is a matter of the proper inferences to be drawn from undisputed financial or economic facts, and no displacement of the right of trial by jury is presented, summary judgment is, obviously, a valuable means of resolution of otherwise protracted antitrust issues. Its potentialities for avoiding

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[34] See *Seminar on Protracted Cases*, 23 F.R.D. 319, 399, 604 (1958).

[35] A copy of these documents is attached as Appendix A.

the procedural and administrative snarls of the "big case" are clear. In such contexts, summary judgment has repeatedly received the approval of this Court in civil antitrust litigation. See *Associated Press* v. *United States*, 326 U.S. 1 (1945); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1 (1958). And see also *United States* v. *White Motor Co.*, 194 F. Supp. 562 (N.D. Ohio 1961), defendant's appeal docketed as No. 619, this Term.

The issue in this case was, of course, not one of an alleged conspiracy to restrain trade. The issue was one of the conclusions to be drawn from undisputed financial facts and data—indeed, from the same basic data which was used by both parties in contending for the Court's judgment below. Obviously, in such a context the use of summary judgment, in an appropriate case, is perfectly proper.

C. However, the Government points to certain alleged instances of disputed facts and "inferences" which, it argues, should have precluded the grant of summary judgment in the case at bar. But no genuine dispute as to any material fact at issue in the Court below is disclosed by the Government's presentation.

1. The Government contends (Gov. Br. 39-41) that a factual dispute was created by the conclusory affidavits of the Government economist and the Government accountant that before the acquisition HHM was "in a sound condition and not in a failing condition nor heading in that direction." (Gov. Br. 39-40). But, as we have indicated in the Statement of Facts, these conclusions were founded upon the same basic

data upon which Diebold moved for Summary Judgment, and upon certain public financial documents as to whose existence there was no dispute. That the Government economist and accountant should draw different conclusions from this basic data from the conclusions Diebold drew hardly creates a genuine dispute as to a material issue of fact. Certainly the grant of summary judgment should not be precluded by the circumstance, for example, that a Government economist is willing to swear that a company which is constantly overdrawn[36] on its bank accounts and which has fallen into the series of manifestations of hopelessly insolvent position which were evident in HHM in 1959 is nonetheless "in a sound financial condition." (R. 600).

2. For the reasons we have already outlined, the Government's figures and comparisons as to HHM's long-term financial position did not create a genuine factual issue, as suggested by the Government (Gov. Br. 39). Here again there was no dispute as to the underlying data. It was Diebold's legal contention that these "long-term" figures were irrelevant and noncontrolling on the issue before the Court. This con-

[36] The Government also suggests that there may be a factual dispute as to whether HHM was "overdrawn" on its bank accounts (Gov. Br. 41). But there is no question—except as created by the Government's misreading of the record (see note 7, p. 12, *supra*)—as to the basic facts. HHM habitually and to a substantial extent during 1959 issued checks without money in the bank to cover them. However, when these checks reached the drawee, there were (with only slight margins at times) sufficient funds to pay them. The Government's contention that HHM was never overdrawn, then, is simply a matter of characterization of these basic facts; and, as we have demonstrated, the Government's characterization does not accord with accounting usage (see note 6, p. 11, *supra*).

tention obviously raised an issue which could be decided as well upon a Motion for Summary Judgment as upon the introduction of the basic documents on trial through an identifying witness on the stand.

3. The Government states, without pointing to any factual conflict, that there were factual disputes as to the other so-called "alternative" purchasers of HHM. But we submit that there was no dispute as to any fact material to the judgment. We have demonstrated that the undisputed facts of record indicate that none of these interests ever considered that he had made a definite offer for HHM, and that none had received accurate financial data about HHM by way of any disclosure from Mosman. The record is clear, without conflict as to the basic, material facts, and was fully adequate for the District Court's judgment that none of the three interests involved could be considered a serious possibility as an alternative purchaser of a company in HHM's condition.

4. Finally, the Government, presumably in an effort to generate an issue suggestive of the *Poller* case, suggests that summary judgment was improper in the light of an alleged conflict as to whether Diebold had an anti-competitive *intent* in acquiring HHM. This issue as to motive—which does not even appear to have been raised by the Government in the District Court—was not in fact the subject of conflicting proofs below. It was undisputed on the record that Diebold was in need of additional plant space to relieve its overcrowded facilities in Canton, Ohio, where efficient economic expansion was not feasible (Fdg. 27, R. 69; R. 13, 360). HHM's facilities permitted Diebold to have a more complete product line, and compete more effectively with its competitors such as Shaw-

Walker and Sperry Rand (R. 13-14, 361). The Government took no exception to Diebold's proposed finding to this effect.[37]

To generate an "issue" to the contrary for the first time on appeal, the Government grasps at various straws. The Government points to the fact that Diebold may have paid more for HHM than it was worth.[38] But in the light of Diebold's general ignorance as to the true financial condition of HHM, this bit of "evidence", at most barely probative, becomes meaningless. Next, the Government mentions a record item to the effect that on a completely unrelated occasion a representative of Diebold had approached a small businessman, having no connection with HHM, and made an anti-competitive proposition to him (Gov. Br. 43, R. 396-97). It staggers the imagination to assume, as the Government evidently does, that such an incident is sufficient to put a stain upon a company's motives for the rest of its business history. Lastly, the Government suggests that Diebold's closing down of HHM's sales offices and the reductions in force at its HHM Division were not due—as the evidence of record

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[37] See the unprinted "Plaintiff's Objection to Defendant Diebold's Proposed Findings of Fact and Conclusions of Law" which attacked Diebold's view of the record in great detail, but which did not dispute the proposed finding (Fdg. 27), which the District Court adopted, as to Diebold's. motive in the acquisition

[38] The Government's expression of the purchase price paid is somewhat misleading. The Government states "that Diebold paid $3,000,000 in cash and agreed to assume liabilities of about $1,800,000 for the assets of a company whose total net worth was approximately $2,300,000" (Gov. Br. 42). Since liabilities are deducted before net worth is reached, the suggested comparison between $4,800,000 and $2,300,000 is improper. Diebold purchased HHM for its manufacturing facilities, which Diebold urgently needed (R. 361, 389).

indisputably shows them to be—to HHM's deteriorating business condition, but to anti-competitive motives (Gov. Br. 43). The short answer here is that, as stated, the record is clear as to the reason for these shrinkages in HHM's business. If the Government wished to controvert Diebold on this, it had the opportunity of filing proofs to the contrary, or of making an affidavit under Rule 56(f) suggesting the existence of a genuine factual dispute based on facts to which the party making the affidavit did not have immediate access.[39] No such proof was tendered nor was any such

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[39] See 6 Moore, Federal Practice (2d ed.), pp. 2345-46. The Rule 56(f) procedure affords the party making the affidavit an opportunity to take further proof, and have further discovery by deposition or otherwise, in an effort to locate substantiation for the assertions of factual dispute which he makes. The Government, in fact, made one use of the Rule 56(f) procedure in the District Court (R. 281), but never sought to use it in respect of the matters now raised as an afterthought on appeal. Where a party does not make use of the Rule 56(f) procedure, it is of course bound by the record on the summary judgment motion as it stands. *Dyer* v. *McDougall*, 201 F. 2d 265 (2d Cir. 1952).

Another afterthought issue raised by the Government (Gov. Br. 41-42) seems not only to be an afterthought but to be altogether immaterial. The Government for the first time on appeal contends that summary judgment precluded it from showing that the worst part of the deterioration of HHM's financial condition came after HHM and Diebold had orally agreed on the basic terms of the acquisition, which required Diebold to pay all of HHM's liabilities unpaid at the date of closing. But inasmuch as HHM was clearly in a failing status by the date of the acquisition, this point appears totally immaterial. If here had been no acquisition, whenever contracted for, HHM could not have survived for any period of time after September 1959, the date when it was in fact acquired. If the Government's reference should be construed as a suggestion that Mosman neglected the payment of his accounts payable because Diebold had undertaken their payment, and that therefore the catastrophic figures for the summer of 1959 are misleading, it must be remembered that the enormous backlog of accounts payable which HHM had accumu-

affidavit filed; and the whole "issue", in fact, was not raised in the District Court.

It would make a mockery of the summary judgment rule to permit spurious "issues" of this nature to be introduced into the case for the first time in a brief on appeal rather than through presentation to the District Court in the manner prescribed by Rule 56. Yet this issue has been raised by the Government for the first time on appeal to this Court.

* * *

Clearly, the undisputed basic facts here called for summary judgment in favor of Diebold. The various suggestions of factual dispute raised by the Government either concern conclusions to be drawn from the basic facts; concern immaterial matters; or are simply afterthoughts on appeal not supported by any actual conflict in the record before the District Court. Obviously, none of these can preclude the entry of summary judgment. The record was an extensive one; the issues were not those of intent, conspiracy, or other matters difficult to resolve without trial. The task of analysis of the financial figures of record would have been the same had the figures been introduced from the witness stand by identifying witnesses. The grant of summary judgment was appropriate in the context of the case.

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lated by the time of the closing was not matched by any accumulation of cash with which to pay the accounts. Rather, HHM had a negative cash position. No dividends were paid in the summer of 1959. If HHM were not insolvent in the summer of 1959, but Mosman were simply holding up payment of its accounts payable, a buildup in its cash position, instead of the contrary, would have been experienced.

CONCLUSION

The Government has pointed to no error of law committed by the District Court, and in fact there is no serious dispute between the parties as to the legal principles involved in this case. The undisputed facts revealed a unique and almost bizarre story of HHM's desperate financial condition in 1959; and of the extraordinary measures which the company used in its efforts to conceal and, unsuccessfully, to cope with that condition. The District Court thoroughly canvassed the financial, economic and other facts introduced in the voluminous record by the parties. The District Court's conclusion was the correct one upon the undisputed facts; that HHM at the time of its acquisition was in such financial condition that its acquisition could not have the substantially adverse effect on competition defined in Section 7 of the Clayton Act.

Accordingly, it is respectfully urged that the judgment of the District Court be affirmed.

Respectfully submitted,

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April 1962

APPENDIX A

Stipulation and Order in United States v. Cunningham Drug Stores, Inc., Civil No. 20266, E. D. Mich.

[Caption omitted]

Stipulation Re Trial of Issues Raised by Paragraph 15 of Answer as First Step in Trial.

It is hereby stipulated and agreed by and between the parties, by their respective counsel, that all issues of fact and law raised by Paragraph 15 of the Answer* be tried as the first step in the trial, which may or may not be dispositive of the case as the Court may determine, and that pre-trial procedures be directed to those issues, and preparation for and trial of the remaining issues be held in abeyance pending such trial.

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Dated: May 16, 1961

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* The portion raising the "failing company" issue.

[Caption omitted]

Order Re Trial of Issues Raised by Paragraph 15 of Answer as First Step in Trial.

Upon reading and filing the Stipulation of the parties attached hereto, It Is Hereby Ordered that all issues of fact and law raised by Paragraph 15 of the Answer be tried as the first step in the trial, which may or may not be dispositive of the case as the Court may determine, and that pre-trial procedures be directed to those issues, and preparation for and trial of the remaining issues be held in abeyance pending such trial.

HONORABLE THEODORE LEVIN
District Judge

Done at the Federal Courthouse,
Detroit, Michigan, this 16th
day of May, 1961.

SUPREME COURT OF THE UNITED STATES

No. 286.—October Term, 1961.

United States, Appellant, v. Diebold, Incorporated.	On Appeal from the United States District Court for the Southern District of Ohio.

[May 14, 1962.]

Per Curiam.

This is a civil antitrust suit by the Government challenging Diebold's acquisition of the assets of the Herring-Hall-Marvin Safe Company as being violative of § 7 of the Clayton Act. On motion of Diebold the District Court entered summary judgment against the Government on the ground that the acquired firm was a "failing company" under the doctrine of *International Shoe Co.* v. *Federal Trade Comm'n*, 280 U. S. 291 (1930). The case is here on direct appeal. 368 U. S. 894.

In determining that the acquisition of the assets of Herring-Hall-Marvin Safe Company was not a violation of § 7, the District Court acted upon its findings that "HHM was hopelessly insolvent and faced with imminent receivership" and that "Diebold was the only bona fide prospective purchaser for HHM's business." The latter finding represents at least in part the resolution of a head-on factual controversy as revealed by the materials before the District Court of whether other offers for HHM's assets or business were actually made. In any event both findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those

drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co.* v. *Federal Trade Comm'n*, it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56 (c).

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.